

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK

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SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

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IAS Part 30 Heitler J

Index No. 24517/88

**REPLY MEMORANDUM OF LAW OF HERSKOWITZ TO WINDELS’  
OPPOSITION TO CROSS MOTION TO VACATE AND RENEW**

Judith Herskowitz respectfully submits her Reply Memorandum of Law To Windels’ Opposition to Cross Motion to Vacate and Renew the Orders dated April 13, 2004 and October 12, 2004. All the alleged facts stated in Paul Windels’ III Reply numbered 1-14 had already been rebutted in Herskowitz’s Response and Cross motion making it unnecessary to restate them in this Reply. Also the issues raised in Paul Windels’ III Reply are for the most a mere repetition of his moving papers, which Herskowitz has already fully addressed in her Response.

Paul Windels III (“Windels”) changed his position in his Reply to claim that he is “a Receiver of North Jersey Trading Corporation (“North Jersey”) pursuant to Order of this Court dated May 21, 1991”, whereas in his moving paper he represented that he is “a Receiver of the Assets of North Jersey pursuant to Order of this Court dated May 21, 1991”. Thereupon, without an appointment as “Receiver of North Jersey Trading Corporation” (“North Jersey”), by a retroactive application of fabricated procedures under a BCL Article 12 receivership Mr. Windels attempts to legitimate under color of law, an unlawful agreement for distribution of the

corporate surplus made outside of the court. In so doing, Mr. Windels further underscores the invalidity of the distribution order of April 13, 2004 at the time it was issued.

Mr. Windels raises a new false contention in his Reply by calling the April 13, 2004 distribution order a “judicial declaration” of creditor status and rights. The falsity of this contention is easily demonstrated within his moving Affirmation and in particular Schedule 3 thereto, titled “Creditors of North Jersey Trading Corporation”. There Mr. Windels openly admits in footnote 1 that the named persons became “Creditors” in the “amounts owed” solely “as stipulated by the parties in connection with the joint application for distribution of the funds held by the Receiver made on May 29, 2003, and approved by the Court on April 13, 2004”. On page 3, at ¶5 of his Affirmation, Windels states that this stipulation “by the parties” - meaning plaintiff and Windels - resulted from their “agreement” with the “parties in interest to the funds in my possession”, as represented in their application for “an order directing distribution of these funds by order to Show Cause dated May 29, 2003. Thus, the Court’s approval of this prearranged *ex parte* distribution could not and did not constitute a “judicial declaration”.

It is undisputed that none of these so-called “Creditors” made any prior claims; and none with the exception of Steven Delibert appeared on November 18, 2003. Significantly, no claim was presented and proven on that day or on any other day (Herskowitz Affidavit pgs. 10, 11 ¶ 28). Thus, no claims were filed in connection with the publication and no claims were proven as the prerequisite for Windels’ final accounting. Although Windels’ acknowledges that Herskowitz was “the sole objecting party”, no explanation is given as to why Herskowitz was defaulted for not appearing, except to eliminate her opposition papers, when the so-called “creditors”, including plaintiff and four of her attorneys, did not have to appear to present and prove their

claims. Still the Court accepted plaintiff's papers, to which Windels and the non-appearing creditors joined, for approval of distribution as submitted, without any judicial determination.

Mr. Windels' irrelevant and unfounded claim that Herskowitz lacks standing does not negate his impersonation of corporate receiver, as shown in Herskowitz's unrebutted response.<sup>1</sup>

**Windels' Claim He Is Receiver of North Jersey is Unsupported by Any Order of Appointment and Is Contrary to BCL Article 12 and Bankruptcy Code**

In his prior papers Mr. Windels claimed that "[I] am receiver of the assets of North Jersey Trading Corporation ("North Jersey"), pursuant to this Court's order of May 21, 1991)". However, upon having to recognize that the real property of North Jersey was sold in 1994, and he never qualified as receiver under that May 21, 1991 order, because of prior appointment of a receiver in a mortgage foreclosure proceeding that precluded him from acting as receiver under BCL 1218 (a)(1), Mr. Windels has now changed his position in his Reply to claim that he is "a Receiver of North Jersey Trading Corporation ("North Jersey") pursuant to Order of this Court dated May 21, 1991" (Herskowitz's Exhibit 6). However, no such appointment exists in that order and it is the established law that the courts of the State of New York do not have jurisdiction to appoint a general receiver for a foreign corporation such as North Jersey (Herskowitz's

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<sup>1</sup> It is undisputed by Mr. Windels that this September 18, 1992 order upon which he relies to confiscate Herskowitz's stock certificates in North Jersey was entered ex parte under Index No. 23002/92; which was not consolidated with this case, Index No: 24517/88; Windels was never appointed as receiver in the case under Index No. 23002/92; plaintiff appeared individually in that case in which a \$5,000.00 money judgment was entered for Charney payable to her counsel Steven Delibert; pursuant to CPLR §5225(a) Charney could not collect more on that judgment than the sum of \$5,000.00 against Herskowitz's corporate interest in the surplus of close \$700,000.00; moreover the judgment had been "wholly paid". So, that September 18, 1992 order does not deprive Herskowitz of standing and she is very much an interested party to oppose Mr. Windels' accounting based on a fraudulent presumption of a corporate receivership.

initial Memorandum pgs. 1 and 2).

Mr. Windels concedes another impediment to serve as receiver under the May 21, 1991 order was the appointment of a Trustee in the North Jersey Chapter 11 bankruptcy case. Pursuant to 11 U.S.C. §323(a) trustee becomes the representative of the estate of the corporation. The North Jersey property, the apartment building at 200 Riverside Drive N.Y.C. became the property of the bankruptcy estate under 11 U.S.C. §541(a)(1) which brings under bankruptcy control all property of the estate wherever located and by whomever held, including all legal and equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. §543(a)(b)(1) requires a custodian to deliver to the trustee any property of the debtor held by or transferred to such custodian or proceeds product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the action and to file an accounting of the above. So, that no property could have remained in the possession and under control of a state court receiver.

#### **Windels' Fails to Rebut That His Claim for Fees of Receiver is Unfounded**

In view of the fact that Mr. Windels' was not qualified to serve as receiver and was preempted to act as receiver under the bankruptcy laws noted above, his claim for fees that he assisted as receiver in the appointment of trustee and in the sale of the North Jersey real property, is an absolute fraud. Moreover, pursuant to 11 U.S.C. §327(a) a trustee is required to obtain court approval to employ any professional to "assist the trustee in carrying out the trustee's duties under title 11" and to be compensated. But, no such application for the assistance of Mr. Windels was ever made. His reasoning in distinguishing *In re Kraemer* that the receiver was not

entitled to fees because the funds were already in the bank account of the corporation is a distinction without difference in law or fact. No distinction exists here, because the corporate surplus came entirely from the liquidation of the real property in 1994 and, as such, was in trustee's account prior to Windels' appointment as CPLR 5228 receiver by order dated November 21, 1995. It was then transferred to Mr. Windels on or around August 2000.

Mr. Windels' assertion that the May 21, 1991 order appointing him temporary receiver of the property of North Jersey was affirmed in *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1<sup>st</sup> Dept. 1992) is irrelevant as shown above. Mr. Windels never qualified and never served as receiver under the May 21<sup>st</sup> order, and was preempted by the appointment of the bankruptcy trustee, and thus could not be continued and was not continued as receiver of the property in the November 1993 and January 1994 final judgments.

Additionally, in effect in 1995 was the automatic bankruptcy court stay under 11 U.S.C. §362 (a)(3) that prohibited any act to obtain possession or property of the estate or of property from the estate or to exercise any control over property of the estate. Charney's motion for relief from automatic stay was granted in an order dated August 5, 1994 providing that "the movant SUSAN CHARNEY, is expressly authorized to conduct collection and enforcement proceedings, on her behalf and on behalf of Debtor;" and any sums collected were required to be delivered to the Trustee (Copy of order attached) . So, only Charney was authorized as judgment creditor to act on behalf of North Jersey to collect on the derivative judgment with no authority to move for appointment of a receiver. The \$150,000 settlement sum was recovered by Charney through her counsel Delibert on behalf of the estate of North Jersey and, as Windels acknowledges, was paid over to the bankruptcy Trustee. So only Charney recovered it through her counsel Delibert.

## **Windels' Appointment as Receiver was Only as Custodian of Funds**

Regardless of Mr. Windels' claims of having been continued as receiver under a November 21, 1995 order, that order could not and did not give him powers of a corporate receiver under BCL Article 12 because that order was subordinated to orders of the bankruptcy court and was preempted under bankruptcy laws. Furthermore, in the September 28, 1995 application for appointment of receiver, Charney moved for appointment of a post-judgment receiver under CPLR §5228 with no request for appointment under BCL §1203 (Herskowitz Exhibit 10). BCL §1203 requires a pending action, and no new action was commenced or could have been commenced, because of the ongoing bankruptcy case. Even if Mr. Windels' was appointed in violation of the automatic stay as receiver under CPLR §5228, his statutory authority was only "to 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" and that did not give him powers to enter into a "stipulation" for distribution of the **corporate assets**.

The bankruptcy court proceedings were not terminated until sometime in August 2000. Windels' receivership was accepted by the bankruptcy court solely as a custodian of the surplus funds in order to bring an interpleader in the New York court to decide the shareholders' right to those funds under New York law. (See, Windels' Exhibit E, pgs.8 and 9 Memorandum Opinion dated July 10, 2000)

"The bankruptcy trustee is at this point merely a stakeholder of a fund in dispute between the shareholders. The state court receiver is prepared to accept turnover of the fund pending adjudication of the shareholders' rights therein"

"Although this court could adjudicate the shareholder's dispute over the fund, the outcome of that dispute will be governed by state law. The New York state courts are certainly competent to resolve this dispute and were in the process of doing so when the bankruptcy case filed. Now that the debtor/creditor issues have been resolved and the remaining dispute is between two shareholders, it is appropriate for this court to abstain in favor of the state courts".

Since no order exists appointing Mr. Windels as corporate receiver, his reliance on notice requirements of Article 12 cannot apply to his CPLR §5228 receivership, and is therefore without force and effect.<sup>2</sup> Moreover, the satisfaction of judgments given to the jointly liable judgment debtors XXXX and XXXHerskowitz in May 1999 likewise discharged the judgments against Judith Herskowitz as well, so no judgments remained to enforce. Since this is based on established New York law by the New York Court of Appeals, there is no discretion in this lower tribunal to disregard these satisfactions. Thus Windels was merely a custodian of North Jersey's liquidated surplus, none of which came into his possession pursuant to any statutory power.

**Windels Makes Baseless Arguments of Reargument and Res Judicata When He Raised Issues for the First Time and There Is No Determination on the Merits**

Windels' claim that issues raised with regard to the April 13 and October 12, 2004 orders are final and res judicata is belied by his instant motion for approval of accounting wherein he raises for the first time the application of the BCL Article 12 procedures in his fraudulent attempt to retroactively legitimate the distribution pursuant to the April 13, 2004 order. Furthermore, by the very procedures upon which he now relies, to use that April 13, 2004 order as a final order of distribution to creditors, then pursuant to BCL §1211 he was required to give notice of the final distribution to creditors, and to publish same once a week for two consecutive weeks in a newspapers of general circulation, prior thereto, not afterwards. Moreover, since none of the claims were proved, the April 13, 2004 order cannot be and is not final. Nor as shown above, has Windels ever before raised the issue that the April 13, 2004 order is a "judicial declaration".

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<sup>2</sup> The notice requirement under statute is mandated to be done within the time frame required. Only by virtue of the procedures under BCL Article 12, can a person qualify as a claimant or creditor and thereby become entitled to a distribution.

Windels makes false assertions on jurisdiction over Herskowitz in his Memorandum without a supporting affirmation and without producing proof of service as to any order that determined personal jurisdiction on the merits regarding sufficiency of service and long arm jurisdiction. Windels even falsifies decisions of the Appellate Division, when it never affirmed any order dismissing Herskowitz's motion for lack of personal jurisdiction. It is well settled that assertions of fact contained in a memorandum of law may not be considered in the disposition of a motion, nor is a memorandum considered to be a filed paper. *People v. Ferguson*, 55 Misc.2d 711, 286 N.Y.S.2d 976 (Supr. Ct. Queens Cnty 1968). Uniform Rules of Trial Courts of the Supreme Court of New York §202.8 requires that: "Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." Concurrent with this Memorandum I am also submitting a Reply Affidavit on the jurisdictional issue, together with documentary evidence showing that absolutely no determination on personal jurisdiction was made by the Court. This must be taken as true inasmuch as Windels' cannot state facts in a Memorandum of Law.

**No determination on Personal Jurisdiction Was Made Under Statutory Requirements and So The Court Has Acted Beyond its Territorial Jurisdiction**

The basic rules on the territorial limitation of State courts was laid down in *Pennoyer v. Neff* 95 U.S. 714 (1877) as follows:

"The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and **be resisted as mere abuse.**" (Ibid 721)

"No State can exercise direct jurisdiction and authority over persons or property without its territory" ( Ibid 723) (Emphasis supplied)

Disregarded is the fact that Judith Herskowitz is a nonresident well beyond the territorial boundaries of this Court. *Practice Commentaries*, by Vincent C. Alexander to CPLR §302 makes an extensive analysis of long arm jurisdiction and of the minimum contact requirements under the Fourteenth Amendment to United States Constitution. There is no finding of jurisdiction over Herskowitz under requirements of CPLR §302 to subject her to the jurisdiction of this Court

In *Knapp v. Shoemaker* 82 A.D. 2d 15, 442 N.Y.S. 2d 287 (4<sup>th</sup> Dept. 1981) the court held that the action was void ab initio where minimum contacts necessary to satisfy requirements of due process were never in existence in action by New York resident. Also see, *Royal Zenith Corporation v. Continental Insurance Company*, 63 N.Y.2d 975, 483 N.Y.S.2d 993 (1984) Court is without power to render judgment against a party to whom there is no jurisdiction, and a judgment rendered without jurisdiction is subject to collateral attack.

New York long arm statute CPLR §302, permits the assertion of in personam jurisdiction only if the particular claim arises from one of the listed forms of activity, stated in *Practice Commentary*, by Vincent C. Alexander to Mc.Kinneys CPLR §302, C:302:2 as follows:

“In New York, the analysis for long arm jurisdiction under CPLR 302 entails a two part inquiry: (1) Do the facts of plaintiff’s case fall within the coverage of one or more provisions of the New York statute? (2) Assuming an affirmative answer to the first question, does the particular assertion of jurisdiction comport with due process?....If the plaintiff’s assertion of jurisdiction meets the requirements of the statute, the due process inquiry, in turn, consists of a two part analysis: (1) minimum contacts must exist between the defendant and the forum (the ‘purposeful availment’ test), and (2) the assertions of jurisdiction must not offend traditional notions of fair play and substantial justice (the ‘reasonableness’ test)”

CPLR §302 makes clear that a particular assertion of jurisdiction is to comply with due process, Plaintiff’s cause of action must “arise from” one of the listed activities in subdivision (a)(1)-(4). Charney raised her long arm jurisdictional allegations for the first time in her amended

complaint. Herskowitz denied in her motion to dismiss that there existed long arm jurisdiction. Justice Harold Tompkins' December 10, 1991 order cited as *Charney v. North Jersey Trading Corp.*, 150 Misc.2d 849, 850, 578 N.Y.S.2d 100 (Sup. Ct., N.Y. Cty. 1991) on which Windels relies was addressed to the May 8, 1990 order of Justice Jacqueline Silbermann on Herskowitz's initial motion to dismiss. So no ruling was made by Justice Tompkins on the CPLR §302 long arm jurisdiction raised for the first time in Charney's amended complaint to which Herskowitz's second motion to dismiss dated July 1, 1991 was addressed and so was never ruled upon.

So, there is no order determining that the facts of Charney's case fall within the coverage of one or more provisions of CPLR §302. There is no finding that Herskowitz had engaged in any specific isolated, but purposeful business transaction in New York out of which Charney's cause of action arose. As to Charney's allegation in her amended complaint "of a tortious act committed without the state causing injury within the state.....and derive substantial revenue from services rendered in the state", there was also no such finding. Nor could there be such findings, since Herskowitz transacted no business and received no revenue from within the State of New York, all of which were specifically denied in her motion to dismiss.

It is further well settled that if challenged the burden of proving a basis for long arm jurisdiction under CPLR §302 is upon the party asserting it. *Ziperman v. Frontier Hotel of Las Vegas*, 50 A.D.2d 581 (2<sup>nd</sup> Dept. 1975)

"Although the plaintiff need not, in order to sustain jurisdiction, prove that the defendant is actually liable for a tort, the plaintiff must satisfy the following two part burden. First, the plaintiff must establish, factually, that the defendant's acts occurred in New York or are sufficiently New York directed. The second part of the inquiry is whether the acts attributable to the defendant give rise to claim of tort...."

It is further well settled that there must be specific averments as to when and what wrongful acts are attributed to each defendant of wrongdoing. The complaint cannot be vague and must meet the minimum requirements of CPLR 3013 and 3016(b). See, *Di Pace v. Figueroa* 128 A.D.2d 942, 512 N.Y.S.2d 593 (3<sup>rd</sup> Dept. 1987) Complaint by which minority shareholder sought accounting and to recover for mismanagement and waste was held to be inadequate where it generally charged other shareholders with having mismanaged, wasted, and taken corporate assets, but contained no specific averments as to when and what wrongful acts were attributed to each of the other shareholders.

In her amended complaint Charney made general allegations against the defendants Judith, XXXX and XXXHerskowitz without specifying any tortious act attributable to Judith Herskowitz. She had raised in her motion to dismiss that the amended complaint failed to meet specificity requirement of CPLR §§ 3013 and 3016(b), but this was also never ruled upon, and Charney never amended her complaint to plead specific acts as to each defendant. So, there was no determination, and there could not have been any that Herskowitz committed any tort to subject her to long arm jurisdiction of the New York court. Even, if there were a cause of action that arose from defendant's out-of-state tortious act, [which was not the case] further analysis would have been required to meet due process requirements to show that defendants "have sufficient contacts with this state, so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere." (N.Y. Jud.Conf., Twelfth Ann.Rep. 339, 343 (1967))<sup>3</sup>

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<sup>3</sup> In fact if any tort was committed it was by Charney by creating fraudulent, fabricated damages, for her derivative judgment in excess of \$4 million, as set forth in detail in motion

It has been held that the mere fact that respondent is a controlling shareholder in the corporation doing business in New York, will not submit respondent, as an individual, to in personam jurisdiction under the long-arm statute, unless the record would justify piercing the corporate veil. *Ferrante Equipment Co., v. Lasker-Goldman Corp.*, 26 N.Y.2d 280, 309 N.Y.S.2d 913 (1970) That a corporation listed defendant as director, with no other contacts with state, did not give personal jurisdiction over defendant under New York law. *M. Prusman, LTD v. Ariel Maritime Groups, Inc.* 719 F. Supp. 214 (S.D.N.Y. 1989) Acts of nondomiciliary director of New York corporation in allegedly failing to leave Florida, and come to New York to attend directors' meetings, and to perform in New York any of his duties as director resulting in an asserted loss to corporation were not "tortious" within long arm statute. The court held that the failure of a man to do anything at all when he is physically in one State is not an "act" done or "committed" in another State. His decision not to act and his not acting are both personal events occurring in the physical situs. That they may have consequences elsewhere does not alter their personal localization as acts. *Platt Corporation v. Platt*, 17 N.Y.2d 234 270 N.Y.S.2d 408 (1966). CPLR §302 was totally disregarded here, where there was no finding of any of the requirements under the rule to subject Herskowitz to personal jurisdiction in New York, and where alleged omission or inaction relating to a purported breach of fiduciary duty in Florida did

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sequence 45. It was un rebutted by Charney that she manufactured a loss of rental income based on inflated rentals and underestimated expenses of North Jersey, all of which were outside of her amended complaint. That so-called loss of income, excluded many expenses including the salary for Alex Fried that he received since the inception of the corporation in 1958, which conceded by Charney was his sole source of income. Charney's damages included the sum of \$200,000.00 a mortgage she claimed was improperly placed on the North Jersey property, which in fact was used to pay off the first mortgage. Charney manufactured further damages of \$960,000.00 by claiming a loss in market value for the North Jersey real property and prejudgment interest of close to one million dollars. It was upon such fraudulent claims that the corporation was ruined.

not subject Herskowitz to long arm jurisdiction in New York. Charney could not and has not met the strict standard under CPLR § 302. Instead Herskowitz has been subjected to her abusive litigation, for the fees and costs of which the North Jersey surplus cannot be used.

**That Personal Jurisdiction Was Never Acquired Is Further Evidenced by the Fact That the Required Evidentiary Hearing Was Never Held**

Clearly, no personal jurisdiction was acquired where a traverse was set down in the May 8, 1990 order of Justice Jacqueline Silbermann, on the issue of service of plaintiff's Order to Show Cause, but plaintiff upon whom the burden of proof rested, failed to proceed with that traverse and instead resorted to the falsification of that May 8<sup>th</sup> order. In *Post v. Post* 141 A.D.2d 518, 529 N.Y.S.2d 341 (2<sup>nd</sup> Dept. 1988) the court held that an order which directed a hearing constituted the law of the case and was conclusive on all justices of coordinate jurisdiction. The refusal to hold a hearing before the judge that had been previously ordered by another judge was held to constitute a flagrant violation of the law of the case doctrine.

Unrebutted by Windels, at issue here was not only the sufficiency of service, but plaintiff's false claim in her complaint that Herskowitz was a resident of New York when in fact she was domiciled in Florida and no long arm jurisdiction was ever acquired over her under the long arm statute of CPLR §302. It is well settled, that the factual issues raised on long arm jurisdiction required a hearing as well. The issue of domicile is a question of fact and is substantial to the claim of lack of jurisdiction, which issue has to be disposed expeditiously at the threshold of the litigation. *Usher v. Usher*, 41 A.D.2d 368, 343 N.Y.S.2d 212 (3<sup>rd</sup> Dept. 1973) Also see, *Pochna v. Pochna*, 15 Misc.2d 521, 183 N.Y.S.2d 231 (Supr. Ct. N.Y. Cty. 1959) Question of residence required immediate trial. *Pemela v. Ray J.*, 105 Misc.2d 743, 423 N.Y.S.2d 828

(Family Ct. N.Y.Cty. 1980) and *Lax v. Lax*, 59 A.S.2d 677, 398 N.Y.S.2d 435 (1<sup>st</sup> Dept. 1977) None of this occurred here, rendering the \$4.3 million derivative judgment by default and the April 13, 2004 order granting distribution by default void pursuant to CPLR §5015(a)(4).

In *Coles v. Hotel*, 9 A.D. 2d 662, 191 N.Y.S. 2d 663 (1<sup>st</sup> Dept. 1959) on defendant's objection to personal jurisdiction a hearing was required to be held on whether defendant was doing business within the state, so as to be amenable to process and as to whether service could be made legally within the statutory provisions. In *Perlman v. Martin*, 70 Misc.2d 169, 332 N.Y.S.2d 360 (Supr. Ct. Nassau Cty. 1972) the court held that a factual determination must be made on out of state defendant's actual conduct in New York as to whether it met the requisite New York contacts upon which to base long arm jurisdiction. In *Blumenthal v. Allen*, 46 Misc. 2d 688, 260 N.Y.S.2d 363 (Supr. Ct. N.Y.Cty. 1965) where a factual conflict was presented on papers a hearing was essential to determine personal jurisdiction over nonresident defendant. So, any order that purports to determine jurisdiction on factual issues without an immediate trial, is in flagrant violation of due process and the judgment based on such order must be vacated.

## **CONCLUSION**

For all the reasons set forth herein, Herskowitz's Cross Motion to Vacate and Renew the April 13, 2004 order and the October 12, 2004 order should be granted in that it relies on a falsely assumed BCL Article 12 receivership that did not give Windels the powers to stipulate to the distribution upon which this Court's orders rest and because of the clear absence of jurisdiction over Herskowitz and for all the other reasons stated herein, together with such other

and further relief as to the court may appear just and proper.

Dated: October 17, 2005  
Miami Beach, Florida

Respectfully submitted,

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By: \_\_\_\_\_  
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