

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J

SUSAN CHARNEY,

Plaintiff,

-against-

**AFFIDAVIT IN SUPPORT OF
OBJECTIONS TO EX PARTE
PROCEEDINGS ETC.**

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

Defendants.

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 Objections for Having Been Barred from this Court By Disallowing My Motions and Response; By Depriving Me of Standing to Foreclose Me from the Right to Object to Windels' Accounting; So That it Be Conducted ex Parte ; Which Binds No One. .

2. The surplus funds of North Jersey Trading Corporation ("North Jersey") of around \$700,000.00 was transferred from the United States Bankruptcy Court for the District of New Jersey to Paul Windels III ("Windels") upon conclusion of the bankruptcy case sometime in August 2000, upon payment of all claims, administrative expenses and fees. The transfer of the corporate surplus was made upon insistence of plaintiff's late counsel Steven Delibert, that the New York court was better suited to determine shareholders' right to those funds.

3. Plaintiff and Windels never sought a determination as to the shareholder rights to

these funds, instead they secreted that surplus for three years, and confiscated those funds to divide it among themselves and with others in the amounts as they prearranged to empty out North Jersey to the last penny. Plaintiff then sought an approval from this Court of their plan in an Order to Show Cause dated May 23, 2003, which was granted by this Court's order dated April 13, 2004. Herskowitz was foreclosed to appear personally in this Court with threats made by Delibert in his papers and by telephone, that she would be arrested if apprehended in New York. Then on this contrived default Herskowitz's papers were eliminated so that heir disbursement of the corporate surplus as they prearranged would be unopposed.

4. Windels claims his authority to act on behalf of North Jersey to arise from an appointment as "receiver of the assets of North Jersey Trading Corporation, pursuant to a May 21, 1991 order" which was a temporary prejudgment order. Windels concedes all along that he has never taken his oath, never posted a bond and never served under that May 21st order. Moreover, the application for that receivership was never served on the Attorney General of the State of New York as required by law.

5. In March 1993 North Jersey a foreign New Jersey Corporation filed a voluntary petition for relief under Chapter 11 in the New Jersey bankruptcy court. On plaintiff's motion a trustee was appointed in October 1993, who has taken control and possession over North Jersey and its property the apartment building at 200 Riverside Drive N.Y.C. An order was also entered granting Plaintiff's Motion for Relief from Automatic Stay, for the limited purpose for the New York court to enter its final judgment.

6. On November 22, 1993 the Court entered a \$4 million derivative judgment by default against defendants XXXX and XXX Herskowitz (Exhibit 1) and on January 21, 1994 entered the

same judgment against Judith Herskowitz (Exhibit 2). Windels was not continued nor appointed as permanent receiver in these judgments.

7. Conspicuously missing from these default judgments is the requirement pursuant to CPLR 3215(f) the “proof of service of the summons and complaint”. To obfuscate the absence of proof of service of the summons and complaint the above judgments merely recite “the proof of due service of said Motion on each of the defendants” on pages 2 and 3 respectively. (Exhibit 3) As shown by these motions they were served only by first class mail and not by service of process and are totally unrelated to any “proof of service of the summons and complaint”. In fact no proof of service exists because the traverse hearing was never held on the issue of service as directed in a May 8, 1990 order of this Court and so that derivative judgment is void on its face.

8. Upon order dated August 3, 1994 the bankruptcy trustee, liquidated the North Jersey property in a bankruptcy court sale for around \$3 million. Upon full payment of that sum the trustee issued a deed dated September 9, 1994 passing all right and title of North Jersey to Tomer Realty for the property “known as 200 Riverside Drive, New York City, New York (Exhibit 4). Thereupon, the trustee retained the proceeds of the cash sale within the State of New Jersey and North Jersey had no assets, no place of business, and conducted no further business within the State of New York.

9. To avoid the effect of the Florida proceedings pursued by plaintiff, which at the time denied full faith and credit on the New York judgments, plaintiff rushed into the New York court for appointment of a receiver. By Order to Show Cause dated September 28, 1995 plaintiff moved solely on the ground of “CPLR 5106, 5228 and 6401” for the appointment of a postjudgment receiver for the enforcement of that \$4.3 million judgment against Judith, XXXX

and XXX Herskowitz (Exhibit 5). Plaintiff has taken undue advantage of Herskowitz a nonresident, to procure yet another order by default against her, while plaintiff was battling Herskowitz in Florida with her Florida lawyers.

10. Delibert did not name any property of North Jersey within New York, in his Affirmation in support of the September 28th motion, he merely speculated with regard to the funds within control of the trustee in New Jersey because,

“substantially, all creditors have been paid; and the Trustee has informally estimated that at least several hundred thousand dollars will remain for **distribution to the shareholders.**” (Emphasis supplied)

Thereupon, Delibert stated that it appears that the Bankruptcy Court would rather not

“involve itself in the disputes among the shareholders, with which it is not familiar. It would accordingly be appropriate for that Court to return any remaining proceeds to the jurisdiction of this Court, where the disputes among those parties originated; and Charney intends to move for such relief, at the appropriate time”

11. Delibert asked only that, **if the assets were released** by the New Jersey Bankruptcy court there would be a neutral custodian to hold it in the New York court pending determination for distribution to shareholders. The only asset that Delibert claimed to have found was a subscription right to a New York apartment inherited by judgment debtor XXXX Herskowitz. There is no mention of any provision of Article 12 B.C.L. in that September 28, 1995 motion. Nor was there any notice to the bankruptcy trustee of North Jersey, who represented North Jersey.

12. Thereupon, a November 20, 1995 post-judgment order by **default** was entered for plaintiff Susan Charney, on her CPLR 5228 motion, without specifying any provision of Article 12 B.C.L. The only reference to Windels was as temporary receiver under the May 21, 1991 order, without any order that “Windels is appointed permanent receiver” of the property of North

Jersey which in 1995 was nonexistent in New York. Likewise there is no provision appointing Windels even as custodian of the property of North Jersey. The emphasis in that 1995 order was on the CPLR 5228 receiver (Exhibit 6).

13. Notwithstanding that there was no property within the State of New York Windels attached to his Motion for Approval of Accounting of Receiver his oath presworn on January 1995 on that November 20th 1995 order (Exhibit 7) verifying as follows:

“PAUL WINDELS, III ESQ. duly appointed Receiver for the benefit of Plaintiff’s of all rents, issues and profits of the mortgaged premises described in the Complaint in the above entitled action by order of this Court made and entered herein on the 20th day of November 1995, do swear that I faithfully honestly and impartially discharge the trust committed to me as such receiver.”

As noted in ¶2 of the Complaint dated December 1988 that reference is to

“Defendant North Jersey Trading Corporation) hereafter “North Jersey” or “Corporate Defendant”) is a New Jersey corporation.....and owning as its principal asset a parcel of real property located at and known as No. 200 Riverside Drive, within the City and County of New York.”

14. As shown above North Jersey had no title to that property at 200 Riverside Drive in 1995, since by trustee’s deed dated September 9, 1994 title passed to Tomer Realty. So, that this was clearly a falsified oath, which cannot support that November 20, 1995 order.

15. The Court realizes in its March 23, 2006 order that the May 21, 1991 order that appointed Windels only as temporary receiver of North Jersey has become “moot” upon the final judgment (Exhibit 8). So this Court would remake the November 20, 1995 order on the conclusion that it “renewed Windels’ appointment as Receiver”. In view of the Court’s own acknowledgment that “Windels received no property on behalf of North Jersey until September 2000” because it was in the possession of bankruptcy trustee in New Jersey, there was no property of North Jersey

within the State of New York upon which to appoint Mr. Windels receiver in 1995.

16. So, that November 1995 order furnishes no cause for Mr. Windels to publish 13 years later in 2004 his May 21, 1991 appointment where B.C.L. 1207(a)(1) requires a receiver to give “immediate notice of his appointment” and “notice to creditors” to present their claim and where B.C.L. §1207(a)(2) requires the receiver to call a general meeting of the creditors of the corporation within four months from the date of his appointment. Nor do these publications furnish a basis more than one year after Mr. Windels made the payments in July 2004, to retroactively designate the recipients as creditors where no claim could have been made and was not made pursuant to B.C.L. §1207(a)(1)(C) to qualify them as creditors.

17. In the March 23, 2006 order this Court deprived Herskowitz of standing, in advance of the hearing on Windels’ Motion for Approval of Accounting of Receiver which as shown above and in the accompanying Memorandum of Law, relies on a fabricated receivership. The matters upon which the Court relies for depriving Herskowitz standing to exclude her, were not previously heard are unsupported and are contrary to the record and furnishes no basis for the Court to approve Windels’ motion ex parte.

18. On pages 2-3 of this Court’s March 23, 2006 order, the Court states its reason for the depriving Herskowitz of standing as follows:

“Herskowitz alone, objects to Windels’ submission of his final accounting as Receiver for North Jersey, and his request for commission pursuant to B.C.L. §1217. Herskowitz however, has **no standing** to lodge an objection to his accounting” because “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.) To date, Herskowitz has not complied with this order, and there are, at present, arrest warrants outstanding, based upon her failure to comply”. (Emphasis supplied)

However, by this Court's own description the assertion of lack of standing is unsupported and is contrary to the record. Justice Heitler notes the date of that turnover order as September 18, 1992, (Exhibit 9) whereas that \$4 million judgment is dated January 21, 1994. Since that turnover order predates that 1994 judgment by almost two years that 1992 turnover order was clearly not issued on that \$4 million judgment.

19. As previously submitted to Justice Heitler that turnover order was on an August 1992 \$5,000.00 money judgment in another case under Index No. 23002/92 (Exhibit 9). No proof of service of a motion on that turnover motion was ever produced and it was undisputed that the turnover order was without notice and motion served on Judith Herskowitz. That \$5,000.00 money judgment was for counsel fees for Delibert, which abated upon his death and that 700,000.00 surplus is more than enough to pay for it. CPLR §5225 allows the court to order the judgment debtor to pay the judgment creditor so much of the money as is sufficient to satisfy the judgment, or to deliver so much of the personal property as is sufficient value to satisfy the judgment.

20. Moreover, this Court has persistently disregarded that the \$4 million judgment had been fully satisfied including fees as well as that \$5,000.00 money judgment and all the other judgments and which by operation of law discharged all the jointly liable judgment debtors and disposed of the civil warrants of arrest as well (Exhibit 10).

SWORN to before me
this 31st day of August, 2006

JUDITH HERSKOWITZ

Notary Public - State of Florida