

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK

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IAS Part 30 Heitler J.

SUSAN CHARNEY,

Plaintiff

-against-

Index No. 24517/88

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

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**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**

JUDITH HERSKOWITZ named as a defendant herein, appearing pro-se, hereby submits for the record, her objection to any proceeding by this Court on Paul Windels' III "Motion for Approval of Accounting of Receiver" now re-scheduled for September 11, 2006 on the ground that the Court had dispensed with the adversary system of justice to proceed *ex parte*. Judith Herskowitz, has been effectively barred from this Court, by disallowing her motions and responses in opposition to Windels' motion and by denying her standing to prohibit her from participating on that motion, and to be heard in an evidentiary hearing on the issues presented herein. Judith Herskowitz the only party said to be objecting has been eliminated so that the predetermined appropriation of the \$700,000,00 surplus of North Jersey Trading Corporation ("North Jersey") be approved in *ex parte* proceedings with an *ex parte* order, which binds no one.

For approval of Windels' accounting on that surplus the Court purports to act under B.C.L. §1216(c) which requires the Court to "hear the allegations, objections and proofs of all parties interested" before allowing or disallowing the account". However, since this Court has

dispensed with the right to be heard on objections, there are no proceedings here pursuant to B.C.L. §1216(c) upon which to approve Mr. Windels' accounting.

Furthermore, Mr. Windels proceeds on his motion as noted in his "Notice by Receiver of Presentation of Account" dated August 7, 2006 in the purported capacity of "receiver of defendant North Jersey Trading Corporation", which is also how Mr. Windels is referred to in this Court's March 23, 2006 order. The fact is that North Jersey Trading Corporation "North Jersey" is a closed foreign corporation. There is no provision under Article 12 B.C.L. for appointment of receiver of a foreign corporation and in fact no such appointment of Mr. Windels exists. Since, these proceedings are outside of statutory provisions, it is without subject matter jurisdiction and is a nullity. It is firmly established "that where the court has no jurisdiction of the subject matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement or waiver." *Cooper v. Davis* 231 App.Div. 527, 248 N.Y.S. 227 (3<sup>rd</sup> DCA 1931)

**Judith Herskowitz Was Deprived of a Fair Hearing Where the Objective Is to Foreclose Her from Opposing the Prearranged Plan for the Appropriation of the Corporate Surplus and Her Motion and Response to Windels' Accounting Was Disposed Without the Required Evidentiary Hearing under N.Y. B.C.L. 1216(c) to Insulate Windels' Accounting from Objections**

The surplus funds of close \$700,000.00 remained from the bankruptcy sale of the North Jersey real property, after payment of all creditors and administrative expenses. Upon the disingenuous insistence of Mr. Steven Delibert the late attorney for plaintiff Susan Charney, the surplus funds were transferred to this Court for determination for distribution to the North Jersey shareholders of which Herskowitz is a majority shareholder. Attached to Mr. Windels' motion for approval of his accounting as Exhibit E is a July 10, 2000 Memorandum Opinion of the

bankruptcy court expressly ruling on pages 5 and 7 that "this fund belongs to the debtors shareholders" and directed that it be transferred to the New York custodian Paul Windels III "for adjudication thereof the shareholders' rights therein between Judith Herskowitz and Susan Charney" as to the percentage of ownership of each of them.

However, following the August 2000 transfer, Mr. Windels brought no proceeding for distribution of that surplus to shareholders. The surplus funds were secreted from Herskowitz. It was only upon her persistent inquiries, that the surplus funds surfaced three years later in a motion by Mr. Delibert pursued in the name of Charney supported with an affidavit of Mr. Windels. They sought court approval of their prearranged extrajudicial plan to divide the entire surplus fund of close to \$700,000.00 with four other attorneys and for reimbursement of fees to Charney. The Court issued an Order to Show Cause on May 29, 2003 on the motion in which on page 2, the word "hearing" was crossed out leaving only "pending determination of the within motion".

The express objective of these proceedings was to eliminate Herskowitz from opposing that predetermined plan to appropriate the entire North Jersey surplus and to deny any and all of her responses without an evidentiary hearing. Since Herskowitz had not been afforded the opportunity to present evidence and to take testimony to prove the truth of the misrepresented facts and of the record, material issues were never determined on the merits. In fact on the four occasion that Herskowitz traveled from Florida to New York, for hearings held on June 21, 2004, January 5, 2005, April 5, 2005 and January 23, 2006 these were merely brief oral arguments, at each of which the Court declined to accept any of the evidence offered by Herskowitz that were crucial in support of her motions.

In its June 8, 2005 order, the Court directed Mr. Windels "as receiver of the property of

North Jersey Trading Corporation... to move for judicial settlement of his final account pursuant to New York Business Corporation Law Sections 1216 and 1217.” In obvious conjunction with that order, the Court enjoined Herskowitz “from submitting any future filings....without the prior written approval of this court.” to insulate Mr. Windels’ subsequently filed Motion for Approval of Accounting of Receiver from any opposition. Herskowitz’s request to allow her to file a motion to vacate the June 8, 2005 order, was denied by the Court in an October 21, 2005 short form order which stated that:

“For further clarification of the court’s order of June 8, 2005, the court notes that its decision of that date does not preclude Herskowitz from filing a meritorious, non repetitive motion. If such is put before the court for its prior approval, the court will permit the filing of same. Additionally, the court’s decision of June 8, 2005 does not preclude Herskowitz from responding to any motions or orders to show cause brought by other parties in this matter, and Herskowitz should be served with same.”

Judith Herskowitz submitted a Cross motion to Vacate and a Response to Mr. Windels’ Motion for Approval of his Accounting, but it was denied and was not considered in this Court’s March 23, 2006 order on the conclusion that it raised no new issues. Since Mr. Windels’ motion was made pursuant to B.C.L. §1216, there is no provision for such predisposition. To the contrary B.C.L. §1216(c) requires the court to hear the proof and objections in an evidentiary hearing. But, at the January 23, 2006 hearing on Windels’ motion only an oral argument was held, and therefore, Herskowitz’s motion and response, was disposed without the required proof and objections and without allowing any documents to be offered and marked into evidence and without taking any testimony.

**Judith Herskowitz Was Deprived of Standing to Object to Windels' Accounting, Based on an Alleged Debt of \$4 million Owed to North Jersey on a Turnover Order that was only on a \$5,000.00 Money Judgment, And Was Not Allowed To Prove the Nonexistence of This Claim, In Flagrant Deprivation of Due Process**

The March 23, 2006 order was a precursor to the hearing on Mr. Windels' Accounting now reset for September 11, 2006. Herskowitz has been effectively barred from this Court, by foreclosing her from participating in a required evidentiary hearing pursuant to B.C.L. 1216(c) by depriving her of standing, stated on page 2 of the March 23, 2006 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. )

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, and that the order was only on a \$5,000.00 money judgment. By order dated August 8, 2006 the court denied “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”.

It was pointed out in Herskowitz's affidavit in support of the motion for Clarification, Renew etc., (pages 6 -7) that by the Court's own description in its March 23, 2006 order, the assertion of lack of standing is unsupported and is contrary to the record as follows:

“18. ....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, 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.”

Clearly, by law, \$4 million cannot be demanded or collected on a \$5,000.00 money judgment and which were satisfied. This alleged \$4 million owed to North Jersey on a September 18, 1992 turnover order was never ever raised before, and as shown above there never was any turnover order for North Jersey, but individually for Charney payable as counsel fees to Mr. Delibert , and enforceable by Charney. Charney has not filed any papers in that \$5,000.00 judgment case under Index No. 23002/92 to enforce that judgment. Most certainly it is not enforceable by Mr. Windels in the derivative suit, nor does he represent Charney individually. These two cases were never consolidated by motion under CPLR 602. Therefore, this judgment claim cannot be thrown into the within case under Index No. 24517/88, for the sole objective so that Mr. Windels proceed ex parte in order to avoid objections to his accounting, by depriving Herskowitz of standing.

**The Court Acknowledged in its March 23, 2006 Order That There Was No Property Within the State When the November 1995 Order “Renewed Windels’ Appointment as Receiver”; This Absence of In Rem Jurisdiction, And the Lack of Subject Matter Jurisdiction is Not an Omission That Can Be Relieved under B.C.L. §1213 to turn Windels Into a Corporate Receiver under Article 12 B.C.L.**

The issues raised here are jurisdictional that have not been resolved and can be raised at any time. It was in his Motion for Approval of Accounting of Receiver dated September 12, 2005, that Mr. Windels designated for the first time Charney and her five attorneys as “creditors of North Jersey” although they made no claim to Windels. In that same motion Mr. Windels attempts to make himself into a corporate receiver with retroactive notices published on July 2004 on his appointment of “Receiver defendant North Jersey Trading Corporation” “by Order dated May 21, 1991” and with a notice of meeting of creditors published on November 2004, copies of which he attached as Exhibits H, I, J, and K to his motion. Pursuant to Schedule 2, of Windels’ motion practically all the alleged creditors were paid prior to these retroactive publications.

It is undisputed that Mr. Windels never qualified has not taken his oath and posted no bond on that May 21, 1991 order. What the Court relied upon in its March 23, 2006 order was that the “court renewed Windels’ appointment as Receiver in 1995, and thereafter in January 1996 Windels filed said oath and bond” and his publications of his notices in 2004 would give a retroactive effect to his May 1991 appointment of receiver.

The Court directed Mr. Windels to give notice to the attorney general of New York, of the proceedings under B.C.L. 1213 so that Mr. Windels would be relieved “of any alleged omissions which have preceded his application” for approval of final account and for commission as receiver. The office of the attorney general responded through Mr. Neil Mann on August 16,

2006 that it takes no position with regard to the relief requested by Mr. Windels on that receivership.

However, the omission here is jurisdictional that cannot be relieved under B.C.L. §1213. First of all as noted above there is no provision under Article 12, B.C.L. for appointment of general receiver of a foreign corporation such as North Jersey and so that is without subject matter jurisdiction. Furthermore, by this Court acknowledging that North Jersey had no property within the state in 1995 at the time the alleged renewal of Windels' appointment of receiver, because it was in the possession of bankruptcy trustee in New Jersey, there was no in rem jurisdiction for lack of property within the state upon which to renew his appointment.

Article 12 New York Business Corporation Law upon which this Court relies specifically states that it applies to “appointment of receiver of *property* of a domestic or foreign corporation” and outlines and defines particular situations in which a receiver may be appointed by the court in certain types of pending actions. Further not considered by the Court is the fact that North Jersey Trading Corporation a New Jersey corporation is a foreign corporation. Only one of the four actions noted under Section 1202 applies to a foreign corporations namely B.C.L. §1202(a)(4) in “an action **to preserve the assets in this state**” under specified circumstances.

The May 21, 1991 order upon which the Court relies appointed Windels only as temporary receiver and under B.C.L. § 1203(a) that is only before final judgment. To continue that receivership pursuant to B.C.L. §1218 (a)(6), it had to be in the final judgment, as a permanent receiver, but there was no such appointment in the 1993 and 1994 final judgments. Moreover, pursuant to B.C.L. §1206(a) a permanent receiver is vested with the corporate property within the state and since there was none, there was no possibility of an appointment of Mr. Windels as permanent receiver of the property of North Jersey within the state.

It is firmly established that the appointment of a receiver for a foreign corporation is an action in rem, and requires that the corporation have property within the state of New York. *Meyer v. Perograd Metal Works*, 256 A.D. 1077, 11 N.Y.S.2d 125 (2<sup>nd</sup> Dept. 1939) N.Y.Jur. 2d *Receivers* Section 120. Where there were no assets of the corporation within the state, there was no jurisdiction to appoint receiver of the property. In the *Application of Burge* 282 App.Div. 219, 122 N.Y.S.2d 232 (1<sup>st</sup> Dept. 1953) . *Pennoyer v. Neff*, 96 U.S. 714, 722, 727 (1878), is still the controlling law on jurisdiction in this country. The court made clear that the property must exist at the time of the order or judgment is entered and cannot be applied retroactively after judgment.

“[Court’s] jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. “

Additionally, there was no notice of motion for appointment of an article 12 B.C.L. receiver on that November 1995 order. It is well settled that motions cannot be granted merely for reasons orally stated by counsel, since the opposing party is entitled to be served with the papers on which motion is founded, and hence is entitled to know all the grounds for the motion and the decision of the court cannot be based simply upon oral statements of counsel and that was all that was before the court at the time of the granting of this motion. *Jenkins v. Warren* 25

App. Div. 569, 50 N.Y.S. 957 (1<sup>st</sup> Dept. 1898)

The phrase “lack of jurisdiction” is not limited to jurisdiction over the person or subject matter only, but is broadly construed, and applies to an order, that includes a motion decided when none in fact was made or where the prima facie case for such an order was neither alleged nor proved. *Uni-Serv Corporation, v. Linker*, 62 Misc.2d 861, 311 N.Y.S.2d 726 (Civ.Ct. N.Y. 1970)

Mr. Windels has taken control and possession over the entire corporate surplus, has entered into a private agreement for its division and disposition and claims to represent creditors. The appointment of a permanent receiver of the property of a corporation is required to be made on notice and motion and is not a status that can be assumed by self proclamation.

**The Attempt to Retroactively Designate Windels Receiver of North Jersey or of its Assets upon a 1995 Appointment Is in Violation of the Bankruptcy Court Stay in Effect in 1995 and Is Null and Void**

This attempt to retroactively create an Article 12 B.C.L. corporate receivership for Mr. Windels for the appearance that Mr. Windels had the authority as receiver of North Jersey to distribute the surplus funds of close to \$700,000.00 pursuant to a prearranged agreement to creditors of North Jersey is further prohibited and is null and void and is preempted under the federal bankruptcy laws and bankruptcy proceedings pursued in 1995 when the November 1995 order is purported to have renewed Mr. Windel’s appointment as receiver of North Jersey and/or its assets.

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. No request was made to the bankruptcy court to lift the automatic stay for appointment of Mr. Windels as an Article 12 B.C.L. state court

receiver for North Jersey.

Accordingly, this alleged appointment of Mr. Windels is null and void as an act in violation of the automatic stay under Section 362. It is well settled that any action taken in violation of the stay is void and without effect. *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10<sup>th</sup> Cir. 1990); *Matter of Olah* 31 B.R. 39 (Bkrtcy S.D. Ohio 1983). When a motion is filed in the Bankruptcy Court requesting relief from the automatic stay of 11 U.S.C. §362 the appointment of a receiver must be specifically requested and noticed. *In the Matter of Deibbern*, 61 B.R. 730 (D. Neb. 1986).

That 1995 state court appointment upon which Windels relies occurred after the Trustee was appointed by the October 14, 1993 order of the bankruptcy court, and was exercising plenary control over debtor and its property. As such Windels' assertions of his appointment of receiver for North Jersey is an idle act because, despite the broad remedial powers granted under 11 U.S.C. §105(a), even the bankruptcy court is prohibited from appointing a receiver under Section 105(b). It is in patent contravention of 11 U.S.C. 105(b) that Windels purports to act as the "Receiver for North Jersey" or of its assets. The powers asserted by Mr. Windels under Article 12 B.C.L. to designate creditors, to make distribution etc., were powers of the bankruptcy trustee, and the assets including that surplus transferred in 2000, in 1995 it was in trustee's possession and control, and Mr. Windels' claim that his appointment as receiver of North Jersey was renewed in 1995, is an impossibility and is null and void. His claims are a sham and a fraud on the bankruptcy court, and is a subterfuge for the contrived fees for the lawyers, misappropriated from the liquidated surplus, in that pre-arranged illegal fee splitting agreement, set forth in Mr. Windels Motion for Approval of Accounting of Receiver.

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

The Court has repeatedly totally omitted any reference to the full satisfaction of the judgments from all of its orders. Herskowitz has a right to place the full satisfactions into evidence, of which has been repeatedly denied to her. The The full satisfaction of that derivative judgment including fees, alone eliminates the fees, which cannot be a reason to avoid the satisfactions. The Court knows that these judgments are based on the same injury, the damages are unapportioned between the defendants and Judith, XXXX and XXX Herskowitz, were made jointly answerable for the wrongs alleged against them. The common law of joint and several tort liability is the law of the New York, which is binding on this Court holding 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 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." *Gallivan 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 (2<sup>nd</sup> Dep't 1939) *Makeun v. State of New York*, 98 A.D. 2d 583; 471 N.Y.S.2d 293, 297 (2<sup>nd</sup> 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); *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."

**There Was No Basis to Grant Fees on Charney Suit, Where it Was Not a Derivative Suit, but Was Pursued for the Individual Benefit of Charney and Was an Elderly Abuse Against Alex Fried to Deprive Him of His Livelihood, So, There Was No Entitlement to Fees by Any One of the Attorneys Including Mr. Windels, and Not by the Florida Attorneys, Creditors Outside of the State**

Even if Mr. Windels were Receiver of North Jersey (which is not the case) his motion for approval of Accounting fails to define the basis for disbursing the entire corporate surplus for attorney fees and expenses . It is noteworthy that on the Motion for Disbursement etc., of the corporate surplus on page 2 of the Order to Show Cause issued by this Court on May 29, 2003 plaintiff sought pursuant to N.Y. B.C.L. § 626(e) this Court to grant

“Plaintiff and Petitioner Susan Charney *individually and on behalf of North Jersey* Trading Corporation, the costs and disbursements hereof:” (Emph. added)

Nowhere is it distinguished as to the fees Charney sought individually and the fees on behalf of North Jersey. Section 626(e) applies strictly to a *derivative suit* in which the court “may award plaintiff.... reasonable expenses including reasonable attorney`s fees”, so that Charney individually was not entitled to counsel fees under the American Rule. Moreover Windels acknowledged on page 3, of his Memorandum in Opposition to Motion to Vacate dated October 21, 2004 that Charney what Charney pursued as “a derivative action” was individually because,

"Charney claimed that Herskowitz and defendants XXXX and XXX Herskowitz had misappropriated income from North Jersey that rightfully belonged to her".

Mr. Windels made the identical admission on page 2 of another one of his Memorandum in Opposition dated December 13, 2004 and in other papers. Both of these Memoranda were joined by Charney. In fact the title of this case itself is in the name of Susan Charney individually and was never on behalf of all other shareholders similarly situated and on behalf of North Jersey. In all of her papers Charney moved individually and not on behalf of North Jersey. *Glen v. Hoteltron*

*Systems, Inc.* 74 N.Y.2d 386; 547 N. E.2d 71; 547 N.Y.S.2d 816 (Ct. App. 1989) held that

“where the plaintiff sues in an individual capacity to recover damages resulting in harm, not to the corporation, but to the individual shareholder, the suit is personal, not derivative”

Accordingly, Charney's lawsuit for income that belonged to her is not on behalf of the corporation, to entitle her lawyers to fees from the corporation under BCL 626(e). Moreover, Charney conceded in a May 13, 1995 deposition (pgs. 9, 157, 212 , 213 ) that all the income belonged to her father Alex Fried and that the corporation declared no dividends.<sup>1</sup> As was shown in previous motions that alleged damages of \$4.3 excluded any income for her father Alex Fried, for the last ten years of his life and the damage claim was based on a fraudulently inflated rent roll and underestimated expenses. This was elderly abuse, which abuse continues against Herskowitz, who is literally being punished with a \$4.3 million judgment for not using force to strip her father of that income. Charney's lawsuit diminished Fried's income and it was Herskowitz who had to look after the widowed Fried, and so it is she who is entitled to reimbursement.

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- <sup>1</sup> “Q. Did you father draw any money from the corporation?  
A. I think he did. Yeah.  
Q. Did he do this by way of salary or just taking profits?  
A. He got the profits somehow. I'm not sure how.”  
Q. Do you know who paid the monthly condo expenses, and the nurses and so forth for your dad here in Florida  
A. No I do not.  
Q. While he was alive  
A. I do not.”  
Q. Did your dad ever engage in any other type of employment than operating North Jersey Trading Corporation during the time that the corporation has been in existence?  
A. No.  
Q. So that it was his sole source of income?  
A. Right”  
Q. Did you ever receive any dividends from North Jersey?  
A. No.”

**A. Delibert Was Compensated in the Bankruptcy Court and Windels Is Not Entitled to Fees on Surplus That Was Transferred to Him**

Delibert was the only attorney who participated in the alleged derivative suit, for which he was compensated in the bankruptcy court, all other fee issues were also disposed and the surplus was transferred free and clear of all claims. 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, (3<sup>rd</sup> 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. Windels collected no funds. He merely seized the corporate asset that was transferred from the New Jersey Bankruptcy Court and misused it.

**B. The Property of a Foreign Corporation Within the State May Be Used Only to Satisfy the Claims of the Citizens of the State**

The attorneys Christu, Hark and Carlton Fields they are Florida attorneys, who never appeared in the New York derivative case and their claim was unliquidated. The court laid down the principle in *Pennoyer v. Neff* supra, Ibid 724 that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory and that no State can exercise direct jurisdiction and authority over persons or property without its territory. The property of a foreign corporation within the state may be used only to satisfy the claims of the citizens of the state. The New York courts likewise adhere to this principle as expressed in *Stephen v. Zivnostenska Bank, National Corporation*, 140 N.Y.S 2d 323 (Supr. Ct. N.Y. Cty. 1955) The purpose of statute providing that an action may be instituted for appointment of receiver of assets

of foreign corporation within state is to protect domestic creditors. So, there was no extraterritorial jurisdiction, nor any provision under Article 12, B.C.L. for the payment of unliquidated claims to the Florida attorneys Eric C. Christu, for \$105,000.00; Clifford Hark, for \$25,000.00 and Carlton, Fields for \$2,500,00 and these funds must be recovered. forthwith.

**When Delibert Conceded That the Herskowitzes Have Not Withdrawn Their Jurisdictional Objections, this Case Was over and Was Foreclosed by Judicial Estoppel to Come up With Other Fabrications**

Charney relied on an October 2, 1991 order as having disposed of the issue of personal jurisdiction. That order made no determination on personal jurisdiction, but Mr. Delibert misrepresented the May 8 1990 order of Justice Silberman's by equating it with the Herskowitzes' withdrawal of a motion to reschedule a hearing, with the withdrawal of their "jurisdictional claim". This brought on a chain of detrimental events. Justice Tompkins prohibited the Herskowitzes and Fried from raising their jurisdictional defenses on the stated ground that they have "repeatedly raised and reraised the issue of jurisdiction in spite of Justice Silberman's order of May 8, 1990 which permitted the withdrawal of the jurisdictional claim"

Mr. Delibert conceded at a later date in sworn testimony he gave on December 29, 1993, in a related court proceeding that this alleged withdrawal of objections to jurisdiction in Justice Tompkins' October 2, 1991 order was unsupported by the record.<sup>2</sup> Since Mr. Delibert conceded

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<sup>2</sup> "Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXX Herskowitz, XXXX Herskowitz and Alex Fried withdrew their jurisdictional objections in the New York court?

A. In so many words, I don't believe so.

Q. You do not have any such document?

A. I don't believe there is such a document in so many words.

Q. I am asking you if there is any such document wherein these parties withdrew their jurisdictional objections. The same parties as above.

A. I know of no document stating an expressed withdrawal of the objections."

that this was a fabrication this case was over right then and there. Mr. Windels cannot make new arguments now based on a December 10, 1991 order of this Court that the Herskowitz's Motion to Dismiss was denied when it was not the case. Mr. Windels cannot play fast and loose with the courts. Clearly judicial estoppel applies to these abuses by plaintiff and Mr. Windels as was held in *Woodson v. Mendon Leasing Corp.* 259 A.D.2d 304, 686 N.Y.S. 2d 411 (1<sup>st</sup> 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. Due to f this lack of proof service that \$4.3 million judgment is void on its face as shown in the affidavit.

### CONCLUSION

For all the reasons set forth herein, this matter cannot be conducted ex parte and it has to be reset to allow Herskowitz to be heard in an evidentiary hearing, which is also the express requirement pursuant to B.C.L. §1216(c)

Dated: August 31, 2006  
Miami Beach, Florida

Respectfully submitted,

JUDITH HERSKOWITZ J.D.  
Defendant Pro se  
P.O. Box 403543  
Miami Beach, Fl. 33140  
Tel:(305) 534-7600

By: \_\_\_\_\_  
JUDITH HERSKOWITZ