

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

IAS Part 30 Heitler J

Index No. 24517/88

**REPLY TO WINDELS' MEMORANDUM OF LAW IN
OPPOSITION TO MOTION TO VACATE AND RENEW**

Judith Herskowitz hereby presents her Reply to Mr. Paul Windels' III Memorandum of Law in opposition to her motion to vacate the Order dated October 23, 2006 filed on October 26, 2006 purporting to allow receiver's accounting and discharging him as receiver. Herskowitz supported her motion to vacate with an affidavit. It is to be noted that Mr. Windels presented no affidavit in opposition so the facts in Herskowitz' affidavit are undisputed.

Mr. Windels mislabels Herskowitz's motion that it is a "reargument" or "renew" Herskowitz's objections to Receiver's accounting. However, there can be no reargument on what was never argued, nor were the objections to Mr. Windels' accounting required to be "argued" under N.Y. Business Corporation Law §1216 upon which Mr. Windels relies. Pursuant to §1216(c) the objections to the final account are to be made at an evidentiary hearing mandating that the "the court shall hear the allegations, objections and proofs of all parties interested".

However, that required evidentiary hearing was never scheduled and was never held. This is undisputed by Mr. Windels, who candidly stated in ¶6 of the order he submitted to this Court that the September 11, 2006 date set for the presentation of his account was only for an

“oral argument”. This is further supported by the fact that none of the alleged creditors showed up on that day to present their proofs. Furthermore, Herskowitz’s supporting affidavit is un rebutted by Mr. Windels that by the March 23, 2006 order she was barred from making objections based on unsupported allegations upon which she was also not heard prior to that or after that March 23 order, Thus, the renewal is not addressed to any motion, since this was not a procedure upon motion, but to the failure to provide an opportunity to present the allegations, objections and proofs and to schedule and hold an evidentiary hearing for these purposes.

Mr. Windels fails to rebut that he engaged in unauthorized acts. His Memorandum further supports his unlawful and illegal acts and the errors and misconceptions in the order he authored and submitted to this Court entered on October 26, 2006.¹

It is undisputed by Mr. Windels that the required procedure for preparing and submitting an order to the Court pursuant to Rule 202.48 of the Uniform Rules for the Trial Courts of New York State, is not in compliance with that rule, which allows for settlement of an order only “after the signing and filing of the decision directing that the order be settled and submitted” but no such decision was made and filed by this Court. So, there is no provision in that rule for Mr. Windels to volunteer and author an order to suit his purposes.

Furthermore, Mr. Windels purports to act as his own counsel as “Receiver” expressly signing off in his Memorandum in Opposition as Paul Windels III as “Attorneys for Paul Windels III, Receiver”. This is expressly prohibited under Part 36 of the Rules of the Chief Judge

¹ Mr. Windels would like to bar this motion on a June 8, 2005 order. However, this motion, was required to be made within 30 days from the notice of entry, and so there was no time for prior request to file this motion , nor can that order be used by Mr. Windels to oppose this motion for his acts unauthorized by law.

governing “Disqualification from Appointment” § 36.2(c)(8) mandating that “No receiver or guardian shall be appointed as his or her own counsel”. No order exists appointing Mr. Windels III as his own counsel. Adherence to provision of Part 36 is required. So, that Mr. Windels’ Memorandum in Opposition is unauthorized on this ground alone.

Mr. Windels by his own description of the payments he made to the alleged “creditors” proves his manipulation and misuse of provisions of Article 12 B.C.L., to retroactively fabricate a corporate receivership to coverup the misappropriation of the North Jersey surplus of close to \$700,000.00. For approval of payment to “Creditors” as “Receiver” Mr. Windels purports to rely on the orders of April 13, and October 2, 2004. However, these orders were not entered on any proceedings and requirements of Article 12 B.C.L., but on a “Motion for Directing Disbursement of Assets” dated May 29, 2003, prepared and submitted by plaintiff’s counsel, the late Steven Delibert and not by Mr. Windels. That motion was on an out of court plan made by plaintiff through her attorney the late Steven Delibert, and with her other attorneys to divide the entire North Jersey surplus among themselves without any reference to any “creditors”. That coverup attempt that the payments were made to “creditors” of North Jersey, appeared for the first time in Mr. Windels’ Motion for Approval of Accounting filed on September 30, 2005, a year after the April 13, and October 2, 2004 orders and the prearranged payments in July and August 2004.

Mr. Windels’ assertion that these were “outstanding creditors” of North Jersey rings hollow, because the surplus funds were transferred from the Bankruptcy court of Trenton New Jersey, free and clear of all claims of creditors, which was the forum to present claims of creditors, and Mr. Windels received that surplus for distribution to the shareholders of North Jersey. This is the simple explanation of why “no other creditors had appeared and sought

payment from the Receiver”. This retroactive fabrication of “creditors” and that Mr. Windels made the payments “in the amounts agreed to by those creditors” is in flagrant violation of the elementary requirements of Article 12, which under B.C.L. §1207(c) requires creditors to present their claim to the receiver and no such claim was ever made to Mr. Windels as the “receiver”, and under B.C.L. 1210(b), payment is not made in the amounts agreed to by “creditors”, but has to be “proved” to be allowed, which was never the case.

Furthermore, B.C.L. §1216(a) requires that “within one year after qualifying, the receiver shall apply to the court for a final settlement, of his accounts and for an order for distribution”. So that distribution could not have been approved by orders in 2004, two years prior to the presentation of the final account in 2006. Additionally, B.C.L. §1216(b) requires that before the final account is presented to the court, the receiver publish a notice of his intent to file his account. Mr. Windels purports to have made these publications, in July and August 2006 and served a “Notice by Receiver of Presentation of Account”, dated August 7, 2006, setting it for September 11, 2006, pursuant to B.C.L. §1216(c). which as noted above required that the Court “shall hear the allegations, objections and proofs of all parties interested and allow or disallow such account, in whole and in part and make a final order.”² So, in view of the position taken by Mr. Windels that he had already distributed that surplus by these prior orders unrelated and unauthorized under Article 12, B.C.L. his “Notice by Receiver of Presentation of Account” on September 11, 2006, was a pure farce, in furtherance of the coverup.

It is undisputed by Mr. Windels that he never served and never qualified under the May

² Since a final order is required to be entered on the final account, there is no requirement to appeal from the interlocutory orders of April 13, and October 2, 2004 or from any other non-final orders which effect that October 26, 2006 order.

21, 1991 order, which he asserts appointed him “Receiver for North Jersey Trading Corporation”. That order appointed Mr. Windels only as temporary receiver of the property of North Jersey, which came under control and into possession of the trustee appointed by the New Jersey Bankruptcy court in 1993, who sold that property in 1994 and was not continued as permanent receiver in the final judgments. Mr. Windels makes these assertions despite the fact that he does not and cannot rebut that B.C.L. § 1202 does not provide for appointment of a receiver for the corporation especially for a foreign corporation, but only of the property within the State of New York. So, that Mr. Windels’ assertion of that corporate receivership is a legal impossibility, is outside of statutory requirements and is wholly without subject matter jurisdiction. It is undisputed that subject matter jurisdiction cannot be conferred on the court. The problem is that Mr. Windels fraudulently presumes that if he persists in repeating the lie that he is the “Receiver of North Jersey” then the lies become the truth.

Nor does that purported void \$4million default judgment against Herskowitz serve as a saving clause for Mr. Windels. Mr. Windels was fully aware that this judgment was fully satisfied. The controlling New York law of joint and several liability upon which that judgment had been extinguished against Herskowitz is un rebutted by Mr. Windels. Satisfaction of the judgment is a valid defense. So, if Herskowitz had presented authenticated copies of the full satisfaction of the judgments in this Court as Mr. Windels states, then it was required to be marked into evidence and must be accepted as required by law.

Mr. Windels also conveniently disregards as to personal jurisdiction that the decisions in *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dept. 1992) and in the *Matter of Herskowitz v. Hon. Harold J. Tompkins*, 184 A.D.2d 402, 585 N.Y.S.2d 386 (1st

Dept. 1992) were based on Mr. Steven Delibert's false claims incorporated into an October 2, 1991 order that the "Herskowitzes were permitted to withdraw their jurisdictional claim" which was conceded by Mr. Delibert in his December 30, 1993 sworn testimony is unsupported by the record and that it never happened. This was after these appeals, and Mr. Windels cannot profit on the intentional misrepresentations of Mr. Delibert. Numerous other issues have been raised by Herskowitz in her moving paper, which Mr. Windels does not address and are unrebutted.

CONCLUSION

As has been demonstrated above Mr. Windels has acted in violation and outside of the law and has authored that October 26, 2006 order to cover it. Accordingly, it is not a simple disagreement with that order as Mr. Windels would have it. Even if Mr. Windels were the Receiver of North Jersey (which he is not) he fails to show that he would be authorized to make payments under applicable law "in the amounts agreed to by those creditors", because he cannot. So what Mr. Windels has engaged in is the conversion of the North Jersey assets for personal benefit of others. This is a serious threat to ownership of property acquired by hard work, to be taken by the stroke of the pen and is an issue of great public importance. Wherefore that October 26, 2006 order should be vacated.

Dated: January 5, 2007
Miami Beach, Florida

Respectfully submitted,

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