

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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: SUSAN CHARNEY, : IAS PART 30
: : HEITLER, J.
: Plaintiff, :
: : Index No. 24517/88
: - against - :
: :
: NORTH JERSEY TRADING CORPORATION, :
: ALEXANDER FRIED, JUDITH HERSKOWITZ, :
: HERSKOWITZ, and HERSKOWITZ, :
: :
: Defendants. :
: :
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REPLY MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR APPROVAL OF ACCOUNTING AND IN OPPOSITION TO
CROSS-MOTION TO VACATE AND RENEW AND REARGUE

Paul Windels III, a Receiver of North Jersey Trading Corporation (“North Jersey”) pursuant to Order of this Court dated May 21, 1991, respectfully submits this Reply Memorandum of Law in further support of his motion for approval of his accounting and in opposition to the cross-motion of defendant Judith Herskowitz to renew and reargue her motion to vacate the Orders of this Court dated April 13, and October 12, 2004.¹

The sole opponent to the Receiver’s accounting, Ms. Herskowitz, who lacks standing to object by virtue of this Court’s September 18, 1992, Order that she turn over her shares in North Jersey to the Sheriff of New York County,² does not and cannot dispute the facts central to the

¹ Herskowitz’s notice of cross-motion states that it seeks to vacate two orders dated April 13, 2005. No order of this Court bears that date. Her motion papers make clear that the orders she seeks to have vacated are those dated April 13 and October 12, 2004.

² Attached as Exhibit L to the Affirmation of Paul Windels III dated September 12, 2005.

Receiver's motion:

1. That the Receiver was appointed by this Court by Order dated May 21, 1991;
2. That judgment in this action was entered against Ms. Herskowitz in the amount of \$4,300,124.42 on January 21, 1994, which judgment remains outstanding;
3. That the Receiver's appointment was continued by the Court by Order dated November 21, 1995;
4. That the Receiver thereafter filed his oath and bond;
5. That the Receiver took part in the recovery of \$150,000 from defendants ██████ and ██████ for North Jersey;
6. That the Receiver supported the appointment of a trustee in bankruptcy for North Jersey and the sale by that trustee of North Jersey's principal asset, yielding a surplus to North Jersey over its liabilities of over \$600,000 (also including the \$150,000 recovered from ██████ and ██████);
7. That, after payment of all outstanding liabilities, that surplus of \$663,759.68 was transferred to the Receiver by Order of the United States Bankruptcy Court for the District of New Jersey;
8. That, on application by plaintiff and her counsel, this Court ruled by Decision and Order dated April 13, 2004 (the "April 13 Order"), that plaintiff and her counsel were entitled to fees plus reimbursement of expenses for having procured a recovery for North Jersey in this derivative action;

9. That the Court denied Ms. Herskowitz's motion to vacate her default³ underlying the April 13 Order by its October 12, 2004, Decision and Order (the "October 12 Order");
10. That no appeal of the October 12 Order has been taken and the time to appeal that Order has passed;
11. That the Receiver has made no payment other than pursuant to the April 13 and October 12 Orders of this Court whose appeal period has passed;⁴
12. That the Receiver has made payments as consented to by all parties in interest to North Jersey – both creditors and shareholders;
13. That no creditors of North Jersey have appeared after publication of notice other than those who received payment under the Court's April 13 Order; and
14. That no creditors of North Jersey exist other than those who received payment under the Court's April 13 Order;

See generally Affirmation of Paul Windels III dated September 12, 2005 (Windels Aff.), ¶¶ 1-

21. Accordingly, the Receiver's accounting should be accepted and the Receiver discharged upon proof of payment of the remaining funds in his possession as directed by the Court, as requested in the Receiver's motion. *Id.* ¶¶ 22-33.

Being unable to offer any grounds for opposing the Receiver's motion, Herskowitz instead seeks to distract the Court's attention with irrelevancies and repetitions of arguments that

³ Herskowitz failed to appear for oral argument of the application after having been granted two adjournments and having promised the Court on the record that she would appear.

⁴ The April 13 Order was not appealable because of Herskowitz's default.

this Court has rejected time and again in the course of over fifteen years of scorched-earth litigation.⁵ Her attacks against the validity of the appointment of the Receiver are barred under the Appellate Division's decision in this case, *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dept. 1992), as well as by this Court's October 12 Order, which is *res judicata*. Moreover, that the Receiver's appointment was continued by the Court's November 21, 1995, Order after final judgment -- an Order entered in this case and never appealed -- for the purpose of enabling recovery from [REDACTED] and [REDACTED] Herskowitz in connection with the cooperative conversion rights [REDACTED] Herskowitz had in an apartment negates her argument that the Receiver's powers ceased upon the entry of final judgment against her.

Equally unavailing is Herskowitz's contention that the timing of publication of notice voids the Receiver's status as receiver. Herskowitz points to no authority so holding and we are aware of no such authority. That Herskowitz can point to no creditor of North Jersey other than the creditors paid under this Court's April 13 Order refutes that argument by itself. That no such creditor has appeared should hardly be surprising, since the existing creditors of North Jersey as of the time of its bankruptcy were paid off in full by the bankruptcy trustee before the surplus was remitted to the Receiver.

Nor can Herskowitz argue that the Receiver was not acting on behalf of North Jersey in supporting the distribution of funds to the plaintiff and her attorneys in compensation for their time and expenses in this action. In fact, the Receiver joined with plaintiff and her counsel in

⁵ To the extent that Herskowitz was required to obtain the Court's written permission to file opposition papers under this Court's June 8, 2005, Decision and Order ("defendant Judith Herskowitz is enjoined from submitting any future filings in this matter . . . without the prior written approval of this court") (Windels Aff. Ex. M at 13), her papers show no evidence that she has complied with that Order.

asking this Court to award those fees and reimbursement, in other words a judicial declaration that plaintiff and her attorneys were creditors of North Jersey based on the services they rendered in connection with this action. That is exactly what this Court did in its April 13 and October 12 Orders, which are now *res judicata*, and Herskowitz's decision not to appeal those Orders forecloses her from circumventing their effect.

The decisions cited by Herskowitz do not compel a contrary result. *Dulberg v. Ebenhart*, 68 A.D.2d 323, 417 N.Y.S.2d 71 (1st Dept. 1971), involved an attempt by a receiver to evict a tenant from a building after that building had been sold at foreclosure in the action in which the receiver had been appointed. Under those circumstances, the receiver's right to proceed with respect to the building had been extinguished by the sale of the building at foreclosure. Here, by contrast, what the Receiver has done is to seek to obtain assets for North Jersey – whether by assisting in the attachment of the coop conversion rights of Herskowitz or by supporting the sale of the building owned by North Jersey to realize a cash surplus. *In re Kraemer*, 40 A.D.2d 1053, 338 N.Y.S.2d 813 (3d Dept. 1972), held that a receiver was not entitled to fees with respect to funds already in the bank account of the corporation at the time of his appointment. Here again, the funds for which the Receiver is accounting are funds arising from the enforcement of judgment against Herskowitz and Herskowitz and from the sale of the building at a surplus. Indeed, the defendants in this action – including Judith Herskowitz – have taken the position that the corporation did not have such a surplus, as evidenced by the fact that they sought bankruptcy protection. In any event, the Receiver's accounting and application for fees have been consented to by all parties in interest. The sole objector, Judith Herskowitz, has no real interest in this matter because she is under Court Order to deliver her shares in North

Jersey to the Sheriff of New York County on account of her contempt of orders of this Court.

Herskowitz's cross-motion to vacate the Court's April 13 and October 12 Orders avails her nothing. In addition to the fact that those Orders are *res judicata*, and her apparent failure to obtain the Court's written permission to cross-move as required under the Court's June 8, 2005, Order, Herskowitz again has failed to offer any justification for the Court in its discretion to grant reargument. See *Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept. 2001) (a motion to reargue is addressed to the discretion of the trial court). Nor can Herskowitz recast this motion as one for renewal. As a matter of well settled law, a motion for renewal must be based on facts that were unknown to the party asserting them at the time of the original motion and could not have been known at the time. See *Garner v. Latimer*, 306 A.D.2d 209, 761 N.Y.S.2d 657 (1st Dept. 2003) ("a motion for leave to renew is intended to direct the court's attention to new or additional facts which . . . were unknown to the movant" at the time of the original motion); *Cuccia v. City of New York*, 306 A.D.2d 2, 761 N.Y.S.2d 31 (1st Dept. 2003) ("an application to renew must be based upon additional material facts which existed at the time that the prior motion was made but were not then known to the party seeking leave to renew and a valid excuse must be offered for not supplying such facts"). Here, Herskowitz offers no excuse with respect to any of the arguments she presses on her purported motion to renew, renewal is simply unavailable to her. See *Cuccia v. City of New York, supra* (reversing grant of renewal motion in the absence of a valid excuse for not providing facts supporting renewal on original motion).

In fact, Herskowitz disregards the two decisions of the Appellate Division affirming jurisdiction over the case and personal jurisdiction over her in purporting to press her

jurisdictional arguments yet again. *See Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dept. 1992) (affirming May 21, 1991, Order of this Court requiring defendants to answer complaint and denying motion to dismiss for lack of jurisdiction)⁶; *Matter of Herskowitz v. Hon. Harold J. Tompkins*, 184 A.D.2d 402, 585 N.Y.S.2d 386, 388 (1st Dept. 1992) (denying a collateral subject matter jurisdiction challenge to *Charney v. North Jersey Trading Corp.* and imposing sanctions on Herskowitz (and her sons) in the form of a \$5,000 attorneys' fees award plus costs); *accord, Lacks v. Lacks*, 41 N.Y.2d 71, 75, 359 N.E.2d 384, 390 N.Y.S.2d 875, 878 (1976) ("absence of competence to entertain an action deprives the court of 'subject matter jurisdiction'; absence of power to reach the merits does not"). Indeed, as this Court (Tompkins, J.) observed in denying one of Herskowitz's prior motions for reargument of the jurisdictional argument in this case, "there is no legitimate basis for four rearguments on one issue." *Charney v. North Jersey Trading Corp.*, 150 Misc.2d 849, 850, 578 N.Y.S.2d 100 (Sup. Ct., N.Y. Cty. 1991). Similarly, Herskowitz's argument that the settlement between Charney and the Receiver and defendants ~~_____~~ and ~~_____~~ Herskowitz extinguishes the judgment entered against her was presented to the Court (*see* Memorandum No. 4 of Herskowitz dated October 1, 2003, Affidavit of Judith Herskowitz dated May 20, 2004, ¶ 28, Reply Memorandum of Susan

⁶ The Appellate Division affirmed Justice Tompkins's May 21, 1991, order directing the defendants to answer the Complaint "for the reasons stated in [Justice Tompkins's] decision dated April 9, 1991." *Id.* It dismissed an appeal from Justice Tompkins's October 16, 1991, denial of their motion to dismiss on the grounds that it was a motion for reargument but further noted that, had it addressed the merits, it would have affirmed "for the reasons stated by Justice Tompkins in his October 2, 1991 decision." *Id.* Both the April 19 and October 2 decisions denied motions to dismiss based on jurisdiction. *See Charney v. North Jersey Trading Corp.* 150 Misc.2d 849, 850, 578 N.Y.S.2d 100, 101 (Sup. Ct., N.Y. Cty. 1991) (also noting that an earlier challenge to the Court's jurisdiction had been rejected by Justice Silbermann on May 8, 1990).

Charney in Support of Proposed Distribution dated October 14, 2003, at 2-3) and rejected in the Court's decisions of April 13 and October 12, 2004.⁷

The Receiver will not burden the Court with a repetition of his arguments that the Court's decisions of April 13, 2004, October 12, 2004, and February 16, 2005, were correct on the merits of the case. Those arguments are set forth in the Receiver's December 13, 2004, Memorandum of Law in opposition to Herskowitz's motion to vacate that decision and the papers in support of the May 29, 2003, application for distribution of funds held by the Receiver, and the Receiver respectfully refers the Court to that Memorandum of Law, as well as to the papers submitted in opposition to Herskowitz's original application to vacate her default.⁸

⁷ To the extent that Herskowitz argues that the distribution would violate federal bankruptcy law, it is worth noting that, although Herskowitz has known of the application for distribution since June 2003 -- over two years ago -- the Bankruptcy Court has taken no action to reopen the bankruptcy proceedings or take any action to prevent the distribution. Herskowitz previously made this argument in opposition to the motion for distribution. It should be noted that the Bankruptcy Court dismissed the bankruptcy proceeding on the ground that the assets of North Jersey exceeded its liabilities and thus, in directing that the surplus be sent to the receiver, did not retain jurisdiction over the matter. *See* Affirmation of Steven Delibert dated May 28, 2003, in support of the proposed distribution Ex. D.

⁸ *See generally* Memoranda of Law dated March 31, 2005, December 22, 2004, December 13, 2004, October 21, 2004, October 13, 2004, June 15, 2004, and May 28, 2003, and Affirmations of Steven Delibert dated May 28, 2003, and June 15, 2004, and Paul Windels III dated May 28, 2003, and June 15, 2004.

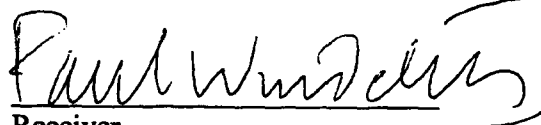
CONCLUSION

For the reasons set forth above and in the Receiver's Affirmation in support of his accounting and his memoranda dated March 31, 2005, December 22, 2004, December 13, 2004, October 21, 2004, October 13, 2004, June 15, 2004, and May 28, 2003, the Receiver's motion for approval of his accounting should be granted and the cross-motion to vacate and renew and reargue should be stricken and/or denied, together with such other and further relief as the Court may deem just and proper.

Dated: New York, New York
September 29, 2005

Respectfully Submitted,

PAUL WINDELS III



Receiver

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