

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J

SUSAN CHARNEY,

Index No. 24517/88

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION
ALEXANDER FRIED, JUDITH HERSKOWITZ
HERSKOWITZ and XXXXXXXXXXXXXXXX

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO RENEW AND TO VACATE ORDER TO SETTLE
RECEIVER'S ACCOUNT AND TO DISCHARGE RECEIVER**

JUDITH HERSKOWITZ submits this Memorandum of Law in support of her Motion to Renew and to Vacate and To Set Aside The Order to Settle Receiver's Account and to Discharge Receiver dated October 23, 2006 pursuant to New York CPLR § 2221(a) and §5015 for having been entered ex parte; without the required evidentiary hearing, in total disregard of Herskowitz's papers, in flagrant denial of due process, so that the decision would be as authored by Mr. Paul Windels III on his fictional receivership and creditors, to appropriate the entire remaining corporate funds of \$700,000,00 which he has done by commission of criminal acts for which the civil court cannot be used. For the facts Judith Herskowitz relies on her supporting Affidavit.

None of the issues raised in this Memorandum of Law, which is a summary of the objections raised to Mr. Windels' Motion for Approval of Accounting of Receiver were considered nor on prior motions. Moreover, as noted below the order was entered without this Court rendering a decision and without meeting requirements of New York Business Corporation Law under Article 12.

There Was No Decision Upon Which To Settle Order

The order that was signed by this Court on October 23, 2006, was presented by Mr. Windels purportedly pursuant to Rule 202.48 of the Uniform Rules for the Trial Courts of New York State. However, the Rule provides for settlement of order only “after the signing and filing of the decision directing that the order be settled and submitted”. An example of this is shown in Exhibit 1 attached to the accompanying affidavit , in which the court made the decision and then directed to “settle order”, upon which a “Notice of Settlement” was served attached as Exhibit 2. No decision with “settle order” was made by this Court for Mr. Windels to present his self-serving order to this Court for his “Notice of Settlement” dated September 22, 2006 with the proposed order attached. Since there was no decision there was nothing to which to submit a counter order. On this ground alone that October 23, 2006 order is a nullity.

The Requirements of B.C.L. Article 12 Have Not Been Met

Mr. Windels purported to rely on §1216 in his Motion for Approval of Final Accounting of Receiver. Section 1216(c) requires that:

“Upon presentation of such account, 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. The court may refer the account and the hearing, in whole or in part, to a referee who shall report thereon to the court.”

This provision also makes clear that it is the Court that is to “make a final order” and so that authority cannot be delegated to Mr. Windels. Furthermore, the order is to be made upon a hearing on the account. By Mr. Windels’ own stated fact in ¶6 of his proposed order, that September 11, 2006 date on his motion was set for “oral argument” and so it was not for the hearing required under §1216(c) cited above. Mr. Windels’ proposed order was signed by the

Court verbatim, and because that ¶6 was deleted after Judith Herskowitz brought the foregoing to the Court's attention in her Objection and Rejection of Windels' Proposed Order Settling Receiver's Account Etc., dated September 29, 2005, most certainly does not alter the fact that no evidentiary hearing was set and no referral was made to a referee.

Omitted by Mr. Windels from his proposed order is the fact that Judith Herskowitz had come to New York on his motion for approval of his accounting on January 23, 2006. Following that a March 23, 2006 order was entered that reset Mr. Windels' motion and barred the appearance of Herskowitz to object to Mr. Windels' accounting, and rejected her s timely filed papers in opposition, by depriving her of standing on the assumption that she owed North Jersey \$4 million on a 1992 turnover order, which as shown in the accompanying affidavit was never the case.

No record has been created on Mr. Windels' purported accounting, there is no proof of entitlement to payment, no time sheets no receipts for expenses, no bank statements no cancelled checks. Noted in that October 23, 2006 order is an April 13, 2004 order for having directed "distribution of the funds" of close to \$700,000.00, which was the entire remaining assets of North Jersey Trading Corporation ("North Jersey"). With due regard this was based on a private out of court plan as pre-arranged by the late Mr. Steven Delibert attorney for plaintiff with a half dozen other participants including Mr. Windels, without the knowledge of Herskowitz, a majority shareholder of North Jersey. Needless to say there is no provision for such clandestine arrangement under Article 12 B.C.L. To the contrary §1204(a)(1) requires an oath of receiver to "faithfully, honestly and impartially discharge the trust committed to him".

That April 13, 2004 order has no relevance to Mr. Windels' final account under B.C.L. §1216 where that prearranged deal for distribution of the entire corporate surplus was agreed

upon and carried out and approved in that April 13, 2004 order, without considering or meeting any of the requirements under Article 12, B.C.L, to come under its provisions. As such, there was no prior publication of appointment of receiver and notice to present claims as required under B.C.L. § 1207(a)(1); no claims were ever presented in writing to receiver pursuant to §1207(a)(1)C); no general meeting of creditors of the corporation was called pursuant to notice published as required under §1207(a)(2); and where it is expressly provided under §1210(b) that the receiver can distribute the funds to creditors only “whose claims have been proved and allowed”, which was not the case.

In fact the designation of creditors was made for the first time after the fact, after the distribution and payment of that surplus, and that labeling of creditors appeared for the first time in Mr. Windels’ final account that he filed on September 30, 2005. Nevertheless, the fact is that prearranged deal for the appropriation of the corporate surplus was unassailable from its initiation, by rejecting any and all opposition by Judith Herskowitz. Accordingly, Judith Herskowitz’s nonappearance at an “oral argument” on September 11, 2006 in support of her objections that were already rejected by a prior March 23, 2006 order that denied her standing so that Mr. Windels’s accounting would be unopposed and where none of the alleged creditors appeared to prove claims they never made, furnishes no basis for approval of Mr. Windels’ accounting ex parte.

Lack of Subject Matter Jurisdiction

The issue of subject matter jurisdiction can be raised at any time, and in fact has been raised and was fully briefed. At issue is the lack of subject matter jurisdiction to confer on Windels the fiduciary capacity of “Receiver of North Jersey Trading Corporation” which alone

renders the October 23, 2006 order void and is null. Whether Herskowitz did or did not appear that has no effect on this subject matter jurisdiction, because Mr. Windels was not only never appointed “Receiver of defendant North Jersey Trading Corporation”, in that May 21, 1991 order, but no general receiver of the corporation is provided under B.C.L. Article 12.

It is not within the power of the litigants to invest a court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the court has not jurisdiction of the cause of action or subject-matter involved in a particular case, such jurisdiction cannot be conferred by consent,” *Cooper v. Davis*, 231 App. Div. 527, 248 N.Y.S. 227 (3rd Dept. 1931). It has been further held that the court acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally where it undertakes to exercise the power and jurisdiction to which the statute has no application. *Lynbrook Gardens, Inc. V. Ullmann*, N.Y. Supp.2d 888 (Supr. Ct. Nassau County 1942)

In *Morrison v. Budget Rent a Car Sytems, Inc.* 230 A.D.2d 253, 657 N.Y.S., 2d 721, 724, 725 (2nd Dept. 1997) subject matter jurisdiction was described as follows:

“Subject matter jurisdiction is an ‘absolute [stricture] on the court’ in terms of its statutory or constitutional capacity to adjudicate a particular types of suits In New York, the authority of courts to adjudicate classes of cases derives ultimately from article VI of the New York Constitution. The constitutional limits that are placed upon particular courts define their authority and, hence, their subject matter jurisdiction, so that no New York court may exercise powers beyond those granted by the New York Constitution and the implementational statutes..... Even the New York Supreme Court, which has been called a court of general ‘unlimited and qualified jurisdiction....may not entertain action over which it lacks subject matter jurisdiction. ... If, a court lacks subject matter jurisdiction, the parties may not confer it on the court A judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived.”

Mr. Windels’ receivership is outside of statutory provisions, and so it is without subject

matter jurisdiction. B.C.L. §1202 (a) provides only for “appointment of receiver of *property* of a domestic or foreign corporation” particularly when the corporation is a foreign corporation that North Jersey is a closed New Jersey corporation. Mr. Windels never qualified and never served as receiver of the assets of North Jersey under that May 21, 1991 order. Mr. Windels does not appear as Receiver of the assets of North Jersey in that October 23, 2006 order. Nor could he where North Jersey filed a voluntary petition for Chapter 11 relief in March 1993 in the New Jersey bankruptcy and its sole New York asset, a 54 unit apartment building came under control of the bankruptcy trustee, who sold it in 1994 and retained the proceeds of the sale. Thereafter, no in rem jurisdiction existed within New York upon which to appoint Mr. Windels as receiver of North Jersey assets. For that reason Mr. Windels could not have been and was not appointed as permanent receiver of the North Jersey assets in the final default judgments of 1993 and 1994.

Mr. Windels was appointed only as temporary receiver of the North Jersey assets in that May 21, 1991 order upon which he never qualified, by taking an oath and posting a bond and never served North Jersey. Moreover, there is a marked distinction between a temporary receiver, who is a mere custodian without title and does not represent the creditors and a permanent receiver, in whom title to the corporate property is completely vested, and who represents all the creditors and stockholders and becomes the trustee of the property of the corporation for the benefit of the creditors and stockholders. *In re French* 181 A.D. 719, 168 N.Y.S. 988 (1st Dept. 1918) Since a bankruptcy trustee was appointed title to the property could not vest in Mr. Windels and thus, he could not act as trustee of the property and so he cannot pretend to act as permanent receiver for creditors. This was further foreclosed by the automatic bankruptcy court stay under 11 U.S.C. §362 (a)(3) which did not allow to obtain possession or property of the estate or of property from

the estate or to exercise any control over property of the estate, which was in the hands of trustee.

The surplus funds of \$700,000.00 was what remained from the sale of the North Jersey real property after payment of all claims and administrative expenses, free and clear of claims of creditors. The bankruptcy judge expressly held that it belonged to the shareholders. However, the late New York attorney Steven Delibert who actively participated in the bankruptcy case had that surplus transferred to a Mr. Paul Windels III a New York attorney to hold those funds as the “neutral custodian”, for distribution to shareholders.

Instead these proceeding were turned into a charade to retroactively create an Article 12 B.C.L. corporate receivership for Mr. Windels with untimely publications for a pretense of his authority as receiver of North Jersey to distribute the surplus funds of close to \$700,000.00 on a prearranged plan to persons named as creditors of North Jersey for the first time by Mr. Windels in his final account he filed on September 30, 2005, which was more than one year after they were paid in 2004 and who never made a claim in this case. As to Mr. Steven Delibert he was named as creditor literally posthumously, after he died in July 2004.

The Court in failing to entertain the papers of Judith Herskowitz has disregarded and never considered any of the issues raised in her papers noted below including the issues that were the objective of the transfer of the funds to this Court.

The Full Satisfaction of the Derivative Judgment That Included the Counsel Fees Extinguished The Pretended Basis for the Appropriation of the Corporate Surplus

There was no basis to continue to pursue Judith Herskowitz on that \$4 million derivative judgment, because it was extinguished upon the full satisfaction issued in May 1999, which included the fees. That \$4 million judgment entered by default in November 1993, and on

January 1994, for plaintiff on behalf of North Jersey. The Court knows that these judgments are based on the same injury, the damages are unapportioned between the defendants and Judith, Xxx and Xxx Herskowitz, were made jointly answerable for the wrongs alleged against them. This is the same on the full satisfaction of the judgments individually for Ms. Charney. All of this was fully briefed previously, but Herskowitz was repeatedly denied the opportunity to have the full satisfactions marked into evidence. This despite the fact that the authenticity of the full satisfactions was acknowledged by the late Mr. Steven Delibert and Mr. Paul Windels before this Court at the June 21, 2004 oral argument, which was before any distribution of the surplus funds.

The common law of joint and several tort liability is still the law of New York and is binding on this Court. Although with joint and several liability the plaintiff is free to pick and choose the tortfeasors against whom she wishes to proceed or to enforce the judgment, it is well settled and is unrebutted that the

"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 (2nd Dep't 1939) *Makeun v. State of New York*, 98 A.D. 2d 583; 471 N.Y.S.2d 293, 297 (2nd 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."

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]."

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, that included all fees and interest, which cannot be a reason to avoid the satisfactions.

This Court Never Acquired Personal Jurisdiction Over Herskowitz and So Cannot Reach Beyond Its Territorial Jurisdiction to Deprive Her of Property

A. 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 Silbermann'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 Silbermann's order of May 8, 1990 which permitted the withdrawal of the jurisdictional claim". Mr. Delibert prevailed on appeal on his fabrication in *Charney v. North Jersey Treading Corp.* 587 N.Y.S.2d 144 (1st Dept. 1992) and in fact obtained that \$5,000.00 sanctions related to this appeal, which he reduced to a money judgment in Case No. 23002/92. It was upon this that he procured that turnover order, which now would be used in the March 23, 2006 order to deny Judith Herskowitz standing to object to Mr. Windels' so-called final account.

However, 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.¹ Mr. Windels cannot compound these fabrications. Nor can he make new arguments on that May 8, 1990 order of Justice Silbermann reinterpreted in a December 10, 1991 order, that the Herskowitz's Motion to Dismiss was denied in that May 8th order 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.

¹ "Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, Xxx Herskowitz, XxxHerskowitz 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."

Windels as was held in *Woodson v. Mendon Leasing Corp.* 259 A.D.2d 304, 686 N.Y.S. 2d 411 (1st 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.

B. The Default Derivative Judgments Are Void On Their Face For Lack of Proof of Service

Further evidenced that no personal jurisdiction over Herskowitz was determined in this Court are the very 1993 and 1995 default derivative judgments which are void on their face. Conspicuously missing from these judgments is the “proof of service of the summons and complaint” as required pursuant to CPLR 3215(f). 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 all which were fully documented in prior submissions.

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 that May 8, 1990 order of Justice Silbermann. As shown above to avoid that traverse hearing plaintiff resorted to her fabrication that the jurisdictional objections were withdrawn by the Herskowitzes when that was never the case.

In *Post v. Post* 141 A,D,2d 518, 529 N.Y.S.2d 341 (2nd 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.

C. 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 (4th 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.

Plaintiff raised her long arm jurisdictional allegations for the first time in her amended complaint. Herskowitz denied in her motion to dismiss dated July 1, 1991 that there existed long

arm jurisdiction under CPLR §302. However in light of plaintiff's fabrication that the Herskowitzes withdrew their jurisdictional objection their motion was never ruled upon. .

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 (2nd Dept. 1975). That burden has never been met by plaintiff.

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.

A. Windels Failed to Distinguish as to What Charney Litigated Individually and What If Anything She Litigated on Behalf of North Jersey

It is noteworthy that on page 2, of the Order to Show Cause on plaintiff's Motion for Disbursement etc., of the corporate surplus 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 Xxxand 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), or to make them creditors of North Jersey, who never retained them. Charney conceded in a May 13, 1995 deposition (pgs. 9, 157, 212 , 213) that all the income belonged to her father Alex Fried² and that the corporation declared no dividends. 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

² “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.”

and the damage claim was based on a fraudulently inflated rent roll and underestimated expenses.³ 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.

B. Delibert Was Compensated in the Bankruptcy Court and Windels Is Not Entitled to Fees on the 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, (3rd 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.

C. 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

³ . 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.

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 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.

It Was Upon False Representations That the Surplus was Transferred to the New York Court to Gain Possession and Control over Those Funds in Order to Appropriate it, Which Was by Commission of Criminal Acts For Which the Civil Court Cannot be Used

A. The Appropriation of the Surplus Funds Constitutes Grand Larceny

As defined under New York Penal Code Article 155, Larceny Practice Commentary by William C. Donnino "In the generic definition of larceny, a person "steals property" and commits "larceny" when, "with intent to *deprive* another of *property* or to *appropriate* the same to himself or to a third person, he wrongfully takes, *obtains* or withholds such property from an *owner* thereof" [§155.05(1)].

Under the larceny statute dominion and control of the property, even for a moment, are

the paramount elements of a taking. The object of a larceny is theft of “property [§ 155.00(1)] which includes “any money, personal property, real property, thing in action. For purposes of determining the victim of a larceny, an owner of property is broadly defined as any person who has a right to possession of the property, however limited or contingent, which is superior to that of the purported thief. The surplus was relinquished by the bankruptcy court to Mr. Windels with no intent that he take title to that surplus.

Mr. Windels has taken possession of the surplus by the a trick, fraudulent device, or artifice, animo furandi, as a “neutral custodian” that it would be distributed to the North Jersey shareholders, but the intention at the time was not to perform, but the subsequent appropriation to his own use and that of others, with the intent to exercise dominion and control over those surplus funds wholly inconsistent with the rights of Herskowitz as a rightful owner. Another form of larceny here is larceny by embezzlement, the conversion of the surplus funds to which Judith Herskowitz had a right and that was entrusted to Mr. Windels to hold for purposes of distribution to the shareholders.

Mr. Windels purported to authorize payment to retroactively designated creditors who made no claim and whose claims were nonexistent. In fact Mr. Windels designated them as creditors after they were paid. Further noteworthy is the fact that three of the alleged creditors who received payment of around \$150,000.00 were outside of the State of New York and so under no circumstances could they be paid from assets of North Jersey a foreign corporation. In *People v. Murphy* 198 A.D.2d 525, 604 (2 to Dept. 1993) evidence presented to grand jury was legally sufficient to establish prima facie case of grand larceny and conspiracy' to commit grand larceny arising out of defendant's alleged participation in scheme to appropriate insurance

company funds by authorizing payment on nonexistent claims; although evidence against defendant consisted primarily of accomplice's testimony, sufficient corroborative evidence was presented which tended to connect defendant to the crime.

In view of the fact that the alleged theft of property is in excess of \$50,000.00 it qualifies for grand larceny of the second degree and possibly for the first degree due to other aggravating circumstances.

B. Mr. Windels Impersonated Himself as Receiver of North Jersey

Mr. Windels impersonated himself as receiver for North Jersey Trading Corporation, a foreign corporation, for which there is no provision under Article 12 New York Business Corporation Law. At other times he stated in his Affirmations under penalty of perjury that "I am receiver of the assets of North Jersey Trading Corporation ('North Jersey') pursuant to this Court's order of May 21, 1991" for which he holds no current title and no current office. It was a mere appointment as temporary receiver, under which he never qualified by taking an oath and by posting a bond and in which capacity he never served North Jersey Trading Corporation. Yet, Mr. Windels engaged in false publications of that 1991 appointment thirteen years later in 2004, after he made payment to his falsely designated creditors, and where he was not appointed permanent receiver in the 1994 final judgment.

Pursuant to Penal Code §190.25, a person is guilty of criminal impersonation in the second degree when he: 1. Impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another; or 2. Pretends to be a representative of some person or organization and does an act in such pretended capacity with intent to obtain a benefit or to injure or defraud another; or 3. (a) Pretends to be acting with approval or authority

of a public agency or department; and (b) so acts with intent to induce another to submit to such pretended official authority, to solicit funds or to otherwise cause another to act in reliance upon that pretense.

C. The Commission of Perjury

As to perjury, Penal Code §210.00 and Practice Commentary by William C. Donnino defines its key element as to “swear falsely” which is when such person: (1) “intentionally” makes a false statement (2) which such person does not believe to be true (3) either by (a) while giving testimony or (b) under oath in a subscribed instrument, which includes an affirmation. . Where receiver in account stated that there was given balance of cash in the hands of the receiver and in verifying account stated that he did not know of any error or omission in the account to the prejudice of any of the parties interested in the funds, if statement was not true, error and omission to tell the truth concerning disposal of the money which had been converted and false statement as to the balance on hand would prejudice parties interested and supported indictment for perjury. *People v. Faber* 257 A.D. 473, 14 N.Y.S.2d 96 (3 Dept. 1939)

CONCLUSION

For all the reasons set forth herein, the October 23, order should be vacated and set aside.

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Miami Beach, Florida

Respectfully submitted,

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