

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
XXXXXXXXXXXXXXXXXXXX

Defendants.

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

JUDITH HERSKOWITZ submits a Supplemental Reply Memorandum of Law to Mr. Windels' Opposition to 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, which is made essential by the omission of a May 1991 order, of which Herskowitz has now located a true and correct copy attached hereto as Exhibit A. That May 1991 order appointed a receiver for North Jersey in the foreclosure action of *Joseph Nathanson v. North Jersey Trading Corporation et al.*, Index No. 9134/91 and renders Mr. Windels' retroactive declarations that "I...am receiver of the assets of North Jersey Trading Corporation ("North Jersey"), pursuant to this Court's order of May 21, 1991" void for lack of in rem jurisdiction, is barred on various other grounds and is a fraud.

The facts have been stated in the prior papers. It is undisputed that Mr. Arthur B. Levine was appointed receiver in the foreclosure action over the North Jersey real property, a 54 unit apartment building at 200 Riverside Drive New York City. Mr. Levine qualified by taking an oath, posting a bond and had served as receiver of that North Jersey real property. On the other hand Mr. Windels had never taken an oath, never posted a bond under N.Y. B.C.L. §1204 in

Charney's action for appointment of receiver under B.C.L. § 1202, and so Mr. Windels never met the requirements and in fact never served under that May 21, 1991 order as corporate receiver of the North Jersey property.

It is further undisputed that in March 1993 North Jersey filed a voluntary petition for Chapter 11 relief in the Bankruptcy Court of Trenton New Jersey. Upon plaintiff's motion Karen Bezner was appointed trustee in an October 14, 1993 order. The foreclosure receiver Mr. Levine's final account was approved in a January 26, 1994 order of the bankruptcy court, he was awarded receiver's fees and was discharged. Final judgments were entered in the above entitled case in November 1993 and January 1994, without continuing or appointing Mr. Windels permanent receiver under B.C.L. 1203(b). On August 31, 1994 the real property, the sole asset of North Jersey was sold by the bankruptcy trustee, who retained the proceeds of the sale. Following that there was no property of North Jersey within the state of New York, upon which to seek appointment of receiver. Mr. Windels came into possession of the surplus of around \$700,000.00 only by an interstate fraud that it would be distributed to shareholders of North Jersey.

The Application and Appointment of the Foreclosure Receiver Barred Mr. Windels to Act as Receiver Under the May 21, 1991 Order Over the North Jersey Property

It is well settled New York law that:

“the request for appointment of a receiver of the mortgaged premises, is enough to vest right to rents and profits in mortgagee and is not the actual appointment by the Court that vests rents and profits”.

In Re Flower City Nursing Home Inc., 38 B.R. 642 (Bkrcty. 1984) That May 1991 order was entered on Mr. Nathanson's application filed on or around April 1991 in his foreclosure action on

a mortgage note securing the North Jersey real property, which gave him a prior right to the appointment of a receiver over plaintiff's action under Business Corporation Law §1202. Mr. Nathanson's application and the resulting May 1991 order appointing a foreclosure receiver was an absolute bar to Mr. Windels' claims that he is receiver under the May 21, 1991 order.

Since the North Jersey Property Was under Control of a Receiver There Was No in Rem Jurisdiction, Barring Mr. Windels' Assertions That He Is Receiver of the Assets of North Jersey under the May 21, 1991 Order, Which Is Further Barred under Res Judicata And/or Claim Preclusion

An action in rem is a proceeding taken directly against property. Foreclosure of a mortgage is an action in rem. *Pennoyer v. Neff*, 96 U.S. 714, 722, 727 (1878) Likewise, an action against a foreign corporation involving the appointment of a receiver for the property of the corporation under New York Business Corporation Law § 1202 is an "action in rem". *Meyer v. Petrograd Metal Works*, 255 A.D. 1077, 11 N.Y.S.2d 125 (1939)

As was stated in *United States v. Bank of New York & Trust Co.* 296 U.S. 463, 477 (1936) citing *Penn General Casualty Company v. Pennsylvania*, 294 U.S. 189, 195:

"If the two suits are in rem or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other".

B.C.L. §1202 makes clear that it is an action for the appointment of a receiver for the "property of a domestic or foreign corporation". So, that there must be property and with regard to a foreign corporation that North Jersey is, B.C.L. §1202(4) requires that the property be "in this state".

Since the May 21, 1991 order in the Charney case appointed Windels receiver over the very same real property of North Jersey as the May 1991 order that appointed Mr. Levine in the Nathanson foreclosure action, this court had to yield and did yield jurisdiction to the receiver in

the foreclosure action. Consequently, there was no res or property upon which to base in rem jurisdiction for Mr. Windels to make his claims that he is the receiver of the North Jersey assets pursuant to the May 21, 1991 order. It is well settled that in rem jurisdiction must exist at the time that the order is entered and is not something to be created retroactively at a later date.

Pennoyer v. Neff, 96 U.S. 714, 722, 727 (1878)

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.the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. “

The Court noted in *Trans World Maintenance Services v. Fort Tryon Apartment Corp.*, 166 Misc. 2d 250, 632 N.Y.S. 2d 775 (Civ. Ct. N.Y. Cty 1995) that the role of the receiver in a foreclosure action as well as those appointed under Business Corporation Law Article 12 is the same, preservation of the property committed to their charge for benefit of creditors. RPAP §3125 does not allow the appointment of receiver in another action while an action for foreclosure is pending and allows no other action to be commenced or maintained to recover any part of the mortgage debt, without leave of the court in the foreclosure action.

BCL §1218 (a)(10) likewise does not allow

“the appointment of a receiver or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of the assets of the same corporation”.

Based upon this statute in *Hershbaum v. Compania Petrolera Trans-Cuba* 215 N.Y.S.2d 898 (Supr. Ct. Kings Cnty, 1961) the court held that stockholder’s action for appointment of a receiver for New York assets of a Cuban corporation could not be maintained in view of pendency of another action previously brought by another stockholder of the corporation wherein a receiver

was appointed and continued to function. Nor was there a further opportunity to appoint Mr. Windels corporate receiver under B.C.L. Article 12, since the sole property of North Jersey was sold in August 1994 and so there was no property of North Jersey within the state of New York.

Mr. Windels' purported appointment under that May 21, 1991 order is also barred under the doctrine of res judicata and/or claim preclusion. *In the Matter of Reilly v. Reid* 45 N.Y.2d 25, 379 N.E.2d 172 (N.Y. 1978) where respondent's position was abolished and was not reappointed in an earlier decision, his subsequent action seeking same relief was barred under principle of res judicata or more precisely under claim preclusion. Accordingly, Mr. Windels' receivership of the assets of North Jersey was extinguished by that May 1991 order appointing Mr. Arthur Levine as receiver of North Jersey.

CONCLUSION

Mr. Windels assertions that he is receiver of he assets of North Jersey pursuant to the May 21, 1991 order, is nothing more than a con game to misappropriate the surplus of around \$700,000.00. Mr. Windels comes into this court of equity, with unclean hands and so he is not entitled to any relief and therefore, the October 23, 2006 order must be vacated.

Dated: February 1, 2007
Miami Beach, Florida

Respectfully submitted,

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By: _____
JUDITH HERSKOWITZ