

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

SUSAN CHARNEY,

Plaintiff - Respondent

-against

JUDITH HERSKOWITZ,

Defendant - Appellant.

**AMENDED**  
**NOTE OF ISSUE**

County Clerk's  
Index No. 24517/88

NORTH JERSEY TRADING CORPORATION,  
ALEXANDER FRIED, [REDACTED],  
[REDACTED]

Defendants.

- 
1. The Notice of Appeal on the order dated July 27, 2007 was served on October 3, 2007.
  2. No Record was filed. The original record was subpoenaed on or around May 5, 2008 and Appellant prepared an Appendix of the relevant documents.
  3. This is an appeal from the decision and order of the lower court dated July 27, 2007 entered on August 1, 2007 that denied the motion of Appellant Judith Herskowitz ("Herskowitz") to vacate and for leave to renew the lower court's Order dated October 23, 2006 and entered on October 26, 2006 that settled the accounting of Paul Windels' III ("Windels") and discharged him as the so-called "Receiver of the defendant North Jersey Trading Corporation" ("North Jersey") pursuant to BCL §§1216 and 1217.

Although the order dated October 23, 2006 is a final order it is not appealable, since it granted Windels' motion for approval of his final accounting by defaulting Herskowitz for

“having failed to appear before the Court on September 11, 2006 in support of her objections” and “for the foregoing reason” rejected her objections and opposing papers. See: *In the Matter of Belinda*”OO” 210 A.D.2d 853, 620 N.Y.S.2d 1020 (3<sup>rd</sup> Dept. 1994) and *Diaz v. New York Mercantile Exchange*, 1 A.D.3rd 242, 768 N.Y.S.2d 5 (1<sup>st</sup> Dept. 2003) No appeal lies from order granted upon default, but only from the order denying the motion to vacate the default.

The nature of the cause is a post-judgment proceeding commenced by Charney by Order to Show Cause issued on May 29, 2003, for the disbursement of the corporate surplus of \$682,225.89. This was based on an out of court prearranged plan between Charney, her attorneys and Windels as to the sum each of them would receive from the surplus. It was for unliquidated fees on a derivative judgment entered by default on fabricated damages, without Herskowitz’s day in court, in a case that terminated a decade ago. Despite having presented papers in opposition Herskowitz was defaulted and her papers were rejected. By order dated April 13, 2004 Charney’s proposed plan was approved for the Receiver to disburse the surplus funds, for which Windels had yet to commence publication of notices of appointment of receiver and to file claims pursuant to B.C.L. §1207. He was also directed to file a final accounting under B.C.L. §§1216 and 1217.

Herskowitz moved by Order to Show Cause dated June 2, 2004, for leave to renew on the ground of the full satisfaction of that derivative judgment that included the fees and to vacate the April 13, 2004 non-final order entered by default. In an October 12, 2004 order the lower court disregarded the motion to renew, omitted any mention of the full satisfaction

of judgments and denied Herskowitz's motion to vacate the default, for non-appearance in court on November 18, 2003. This was based upon the undisputed fact that Charney counsel Steven Delibert threatened Herskowitz with arrest if she were to appear and he has deliberately mailed her the court's suspension order untimely. When Herskowitz who is domiciled in Florida had timely received such order, she had appeared at the June 21, 2004 oral argument, so there was no willful default.

Windels did not move for "judicial settlement of his account" until September 30, 2005. As noted above Windels' final account was settled in the October 23, 2006 order. In response to Herskowitz's motion to renew and to vacate, the lower court did modify the October 23, 2006 order, in its July 27, 2007 order from holding Herskowitz in default, to holding that Herskowitz lacks standing to object and be heard on Windels' accounting. The altered ground was based upon a misapprehension of the record, that Herskowitz owes in excess of \$4,000.000 to North Jersey for which she was to turn over her shares in North Jersey, when the facts below show that this was on an *ex parte* turnover order on a \$5,000 judgment entered in 1992 in another case, that was wholly unrelated to that \$4,000.000 derivative judgment entered by default in 1993 and 1994. At any rate both judgments were fully satisfied. Nevertheless, the court below continued to rely on the arrest warrant issued on that *ex parte* turnover order to demean Herskowitz.

The court further altered that October 23, 2006 order from holding that Windels is the "Receiver of the defendant of North Jersey Trading Corporation" in response to Herskowitz's motion that no such statutory provision exists, to holding that Windels is the

“receiver of the property of North Jersey Trading Corporation” without regard that he has not qualified by taking an oath and by posting a bond and never served in that capacity.

The \$682,225.89 was the surplus that remained from the proceeds of the sale of the North Jersey real property in a Chapter 11 liquidation in the United States Bankruptcy Court for the District of New Jersey. That surplus included the settlement sum of \$150,000 paid to the New Jersey bankruptcy trustee in full satisfaction of the derivative judgments. So, there was no property within the State of New York for Windels to act as its receiver. The surplus represented the funds after all claims of creditors had been settled, administered, and adjudicated in the Bankruptcy Court that included the attorneys’ fees relating to Charney’s derivative judgment, which had become an asset of the corporations’ bankruptcy estate.

Through-out these post-judgment proceedings including the July 27, 2007 order, the lower court disregarded the Chapter 11 liquidation of the North Jersey assets in the Bankruptcy Court and misconstrued that liquidation as having resulted from Charney’s shareholder’s derivative action. Whereupon, Charney’s motion for distribution was transformed into a B.C.L. Article 12 proceeding with Windels to administer and to account for that distribution as the receiver.

This was in total disregard that the surplus funds were transferred to Windels upon termination of the bankruptcy court case and came into his possession only as a “neutral custodian” on orders of abstention. Windels was to act as stakeholder pending determination in the New York court of the distributive shares of the shareholders named as Judith Herskowitz and Susan Charney, to which New York law would be applied as to the effect

of the satisfaction of the judgment.

Accordingly, the lower tribunal lacked in rem jurisdiction to authorize Windels to act as receiver over the liquidated surplus and was without subject matter jurisdiction to direct Windels to proceed under B.C.L. Article 12 for distribution and for an accounting on that surplus all of which are also barred under federal principles of res judicata. *The Ins. Co. of the State of Pennsylvania v. HSBC Bank*, 10 N.Y.3d 32; 882 N.E.2d 381; 852 N.Y.S. 2d 812 (2008). Remand to the lower court is respectfully requested for the admission of the record and the excluded evidence, in an evidentiary hearing - that was never held although duly requested - so that the matters would be determined on the merits.

4. The case was in the Supreme Court of the State of New York, New York County.
5. The case is under Index No. 24517/88, Civil Division.
6. The Order and Decision dated July 27, 2007 was entered on August 1, 2007, and was issued by Justice Sherry Klein Heitler.
7. The Appeal is noticed for the October term of 2008.
8. The names addresses and telephone number of the parties and non-party are:

Defendant/Appellant	Plaintiff//Respondent	Non/Party
Judith Herskowitz pro-se	Susan Charney pro-se	Paul Windels III
P.O. Box 403543,	585 West Avenue	187 Garth Road
Miami Beach, Fl.	New York N.Y. 10024	Scarsdale, New York 10583
(305)-534-7600	(212) 799-7903	(212) 374-9260

By:   
JUDITH HERSKOWITZ