

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

SUSAN CHARNEY,

Index No. 24517/88

Plaintiff - Respondent

-against

JUDITH HERSKOWITZ,

Defendant - Appellant.

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

Defendants.

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**PRELIMINARY STATEMENT**

Defendant-Appellant Judith Herskowitz (Herskowitz”) has taken an appeal from an “Order to Settle Receiver’s Account and to Discharge Receiver” of Justice Sherry Klein Heitler dated October 23, 2006 (A-26). Herskowitz moved for an extension of time, however that was denied and the appeal was dismissed. Herskowitz has moved to reinstate the appeal, but she has yet to get an order on it.

At any rate Herskowitz has taken an appeal from a subsequent order dated July 27, 2007 that is also addressed to the October 23, 2006 order. (A-13). The October 23, order was entered without a decision by the court and direction to settle order

required by Rule 202.48 of the Uniform Rules for the Trial Courts of New York State.

While Mr. Windels purported to proceed under §1216(c) B.C.L which requires that upon presentation of receiver's account, the court "shall hear the allegations and proof of all the parties" upon which to "make a final order" no such hearing was set and held. Mr. Windels ingenuously crafted the order approving his account on the premise that Ms. Herskowitz, the only party who objected, failed to appear on September 11, 2006 in support of her objections, and so her objections were rejected and since she was the only party objecting, his accounting was approved.

Herskowitz moved to renew and to vacate the October 23, 2006 order (A-147 and A-149). The July 27, 2007 order was entered on that motion by Justice Sherry Klein Heitler. It was acknowledged that the required hearing under §1216(c) B.C.L was not set, because in a prior March 23, 2006 order, Ms. Herskowitz was foreclosed from raising objections, inasmuch as "she has not qualified as an interested party" because "Herskowitz owes in excess of \$4 million to North Jersey, as there has been a judicial determination that Herskowitz must turn over her shares in North Jersey". Herskowitz had no prior opportunity to be heard on this issue, which is unsupported by the record, as well as by applicable law and is addressed in this brief.

However, as a result of this ruling that July 27, 2007 order vacated the October 23, 2006 order holding that Mr. Windels' account was approved without objections,

because Ms. Herskowitz has failed to appear, it is now acknowledged that it was predetermined that she could not object, and so no hearing was set to require her to appear, so there can be no default, which was implied in the October 23<sup>rd</sup> order. Another issue is that Mr. Windels' claim that he was the "appointed Receiver of the defendant North Jersey" was without subject matter jurisdiction, inasmuch as B.C.L. Article 12, provides only for receiver of the property of the corporation, for which Mr. Windels has not qualified by taking an oath and posting a bond.

That July 27, 2007 order further vacated the October 23<sup>rd</sup> order by designating Mr. Windels as "receiver of the property of North Jersey". While it was undisputed that Mr. Windels has not taken an oath and posted no bond under the May 21, 1991 order, the court relied on a newly stated ground, raised for the first time in that July 27<sup>th</sup> order that the objection to Mr. Windels' lack of qualification is moot, because it was not lodged at or around the time of his appointment as receiver for the North Jersey property under the May 21, 1991 order (The court erroneously relies on *McCabb v. Porter Air-Lighter Co.*, 44 A.D. 102, 104-106 (1<sup>st</sup> Dept.1899) because in *McCabb* the qualification of receiver is not in question.)

That there was no reason to raise the issue of Mr. Windels' lack of qualification at or around the time of the May 21, 1991 order, is evidenced by the Affirmation of Ms. Charney's counsel on her September 28, 1995 motion, which was disregarded.

It was acknowledged in that Affirmation that Mr. Windels never qualified and never served as receiver under that May 21, 1991 order, because it was preempted by a prior appointment of another receiver in a foreclosure case, and was extinguished by the subsequent appointment of a bankruptcy trustee in October 1993.

The North Jersey real property at 200 Riverside Drive, New York City, was sold by the New Jersey bankruptcy trustee in August 1994, who held the proceeds of the sale. Since there was no property within the state there was no in rem jurisdiction for Mr. Windels to claim that he is receiver of the property of North Jersey. Upon trustee's sale there remained a surplus of \$682,225.89, that belonged to the shareholders. So, that surplus was not the result of a liquidation of the North Jersey assets upon Charney having "prevailed in the underlying shareholder's derivative action", to be divided as fees, and was barred on principles of res judicata. So, this was a motion to vacate and renew that was erroneously characterized as "reargument".

Any and all opposition by Ms. Herskowitz was foreclosed. Her papers were eliminated and her requests to set a hearing to take evidence and testimony, were disregarded. The Appendix on this appeal, contains some of the inappropriately excluded court's own record, record from the bankruptcy court and other evidence. No record was created and so the instant orders should be reversed and the case be remanded to the lower court for to admit evidence and take testimony so, as not to limit this appeal to the face of the orders unsupported by evidence.

## QUESTIONS PRESENTED

Did the Court Err in Approving the Accounting Based upon a Prearranged Distribution of the Surplus That Was Barred By the Proceedings and Orders of the Bankruptcy Court under Principle of Res Judicata

Yes the Court erred in not following the abstention order to determine distribution to shareholders,

Did the Court Err in Failing to Recognize the Full Satisfaction of the Judgment for its Legal Effect and to XXX Them into Evidence.

Yes the judgment was fully satisfied, and was extinguished, cannot collect twice on the same judgment.

Did the Court err in Allowing Windels to Proceed as Receiver of the Defendant North Jersey Trading Corporation Where There Is No Statutory Provision for a General Receiver of a Foreign Corporation.

Yes this is a matter of lack of subject matter jurisdiction.

Did the Err in Approving the Final Account of Windels and Allowing Him to Proceed as Receiver of the "Property of North Jersey Trading Corporation

Yes the court erred because there was no property within the state.

Did the Court Err in Acting Beyond its Territorial Jurisdiction Where No determination on Personal Jurisdiction Was Made under Statutory Requirements

Yes there was no arm long jurisdiction over the nonresident Herskowitz

## STATEMENT OF FACTS

Susan Charney commenced litigation in December 1988 in the Supreme Court, New York County Index No. 24517/1988. It was terminated upon the entry of final judgment by default against XXXX and XXX Herskowitz in November 1993, (A. 149) - the sons of Judith Herskowitz - and upon entry of the same judgment against Judith Herskowitz in January 1994 (A. 156) North Jersey Trading Corporation ("North Jersey") owned a 54 unit apartment building, at 200 Riverside Drive New York City. The property was purchased in 1959 by Hedy and Alex Fried - the late parents of Charney and Herskowitz. What was a probate matter Charney turned into litigation on fabricated claims even before Alex Fried died in 1992.

As a consequence of the litigation North Jersey was driven into bankruptcy and filed a Voluntary Chapter 11 petition in March 1993 in the United States Bankruptcy Court for the district of New Jersey. The real property the sole asset of North Jersey was sold by the bankruptcy trustee in August 1994 for \$2,925,000.00. There remained a surplus of \$682,225.89 upon payment of all claims and administrative expenses, including all fees. That surplus included \$150,000 in settlement on Charney's judgments, that was paid to the bankruptcy trustee upon which full satisfactions were given. Concurrently, Charney also pursued a scorched earth litigation in the 11<sup>th</sup> Judicial Circuit in Florida, the domicile of the individual

defendants. However, that court would not reduce her judgments to Florida judgment.

Charney through her counsel Mr. Delibert induced the Bankruptcy Court to abstain from distribution of the surplus. Upon orders of abstention the surplus funds that remained after payment of all claims and administrative expenses, was transferred to the New York court. The sole purpose was for distribution to the shareholders named as Herskowitz and Charney for determination of their distributive shares that would require New York law, on the satisfaction of the judgment.

Although, those funds were received by Paul Windels III in August 2000 to hold it as “neutral custodian” no proceedings were brought for any judicial determination. Charney and her attorneys devised their own out of court plan for dividing the surplus as they prearranged it among themselves. That scheme surfaced upon the repeated inquiries of Herskowitz in Charney’s “Motion for Directing Disbursement of Assets” dated May 29, 2003 . (A-28 and A-31). The surplus was divided, as reimbursement of fees of \$110,000.00 to Susan Charney, to attorneys: Steven Delibert \$401,950.94; Eric C. Christu \$105,000.00; William T. Livingston III \$28,185.83; Clifford Hark \$44,541.12; Carlton, Fields \$2,500.00; and for “receiver” Paul Windels, III \$19,774.95, stated as a lump sum, unsupported with time sheets. Hark, Carlton Fields and Christu are Florida lawyers who did not appear in the case below. Although, there were a litany of claims that Charney pursued individually, for

which no counsel fees are provided by law, no such distinction was made. In fact at all times Charney pursued her litigation in her own name, including the title of the case and not in the name and on behalf of North Jersey.

So, that Herskowitz was thrust back into the New York court a decade after that derivative judgment by default was entered against her. However, that was in name only, because the stated objective was to foreclose Herskowitz from opposing that prearranged scheme for division of the surplus. Herskowitz's fully detailed papers in opposition (A-62) that included the whole history of the case, the bankruptcy court proceedings, her requests to produce the full satisfaction of the judgments, were eliminated with a contrived default, when she could not appear, because of threats of harm to her person by Charney's counsel Mr. Delibert.

Charney's motion was never set for an evidentiary hearing to offer proof and to take testimony. The April 13, 2004 order was entered solely on Charney's papers (A-93). The order was replete with ad hominem attacks, upon alleged facts that arose strictly from the course of Charney's litigation, calculated to destroy Herskowitz's good name and to deprive her of all her assets.

Windels noticed his Motion for Approval of Accounting of Receiver for September 30, 2005, purportedly pursuant §1216 B.C.L. (A-101 and A-103) Windels attached to his motion copies of publication of notices (A-120) he made

from July 2004 to December 2004. Thus he belatedly attempted to create the appearance that he was acting as some kind of corporate receiver for North Jersey under B.C.L. Article 12. These notices were published a year after the plan of distribution was presented in Charney's May 29, 2003 motion, after that April 13, 2004 order that granted that motion and after he had already distributed that surplus. The notices were published 13 years after a May 1991 order of appointment that he relied upon, when the publication is required to be made immediately upon appointment. Mr. Windels invoked the Article 12, B.C.L. proceeding post-judgment, when that is required to be made in a pending action. The recipients of that surplus were designated as "creditors" without having made a claim. Windels purported to engage in publication of notices in the capacity of "receiver of the defendant North Jersey Trading Corporation" appointed by the May 21, 1991 order, (A-123) when in fact no such order exists, because that May 21<sup>st</sup> order was for the appointment of a temporary receiver of the property of North Jersey, for which Mr. Windels had never taken an oath and posted no bond and never served as receiver under that order.

Ms. Herskowitz filed a Cross Motion and Opposition to Mr. Windels' accounting (A-127 and A-129). The matter was set down for a January 23, 2005 hearing at which time Ms. Herskowitz had appeared in court, as she has done several times before, when not threatened with harm to her person.

To eliminate Ms. Herskowitz a March 23, 2006 order (A-142) was entered that denied standing to Ms. Herskowitz because, “she has not qualified as an interested party” to lodge objections to Mr. Windels’ accounting, inasmuch as “Herskowitz owes in excess of \$4 million to North Jersey, as there has been a judicial determination that Herskowitz must turn over her shares in North Jersey”. Ms. Herskowitz’s papers in opposition were stricken.

Thereupon, an October 23, 2007 order was entered (A-26) to Settle Receiver’s Account and to Discharge Receiver, which was wholly authored by Mr. Windels without the required written decision by the court. Ms. Herskowitz moved to renew and to vacate that order (A 147 and A -149). An order dated July 27, 2007 was entered (A-13), which in essence reversed and made substantial changes in the October 23, 2007 order as noted above, so it was not a mere motion to reargue.

That July 27, 2007 order wholly omits the bankruptcy court orders and proceedings and the court’s own record, and puts the North Jersey surplus of close to \$700,000.00 into the posture, as if it were the result of the liquidation of the North Jersey assets after Charney prevailed in the underlying shareholder derivative action. So, it was deemed natural for Charney to move for an order directing the distribution of that sum held by Windels as the “appointed Receiver of the property of North Jersey Trading Corporation”. As further stated in the order, the distribution on

plaintiff's proposed plan was made by the Receiver under B.C.L. Article 12 to "creditors" of North Jersey, which then was approved in the that April 13, 2003.

The order makes clear that Herskowitz was precluded from opposing that plan of distribution, first on pretext of that default, for not appearing on November 18, 2003 and when she appeared to oppose the accounting on that distribution, she was denied standing.

Whereas it is contended in the July 27, 2008 order that the Court did not overlook or misapprehend the relevant facts or misapply controlling principles of law, it is shown otherwise by the court's own record of which no judicial notice was taken, by the excluded bankruptcy court record, by the satisfaction of judgments and other evidence, which were disregarded as well as by the controlling principles of law that were misapplied or not applied. A composite of the excluded documents was also presented on a Motion for Judicial Notice of the Record, but were not addressed.

The excluded evidence shows that the orders of the court, are contrary to the weight of evidence and are unsupported by the record, This is shown below, with some documentary evidence, which are too voluminous to present in the Appendix on this appeal and requires a remand to the lower court.

### **The Judgments Were Fully Satisfied Including Fees and Interest**

The full satisfaction of the judgment that was wholly omitted, alone barred

Charney's prearranged plan for the appropriation of the North Jersey surplus (A-165). The sum of \$150,000.00 was paid to the bankruptcy Trustee by co-defendants XXXX and XXX Herskowitz, pursuant to a Settlement Agreement dated December 1998, in full payment on all of Charney's New York judgments including fees and interest individually and on behalf of North Jersey. The satisfaction of judgments were not filed with the New York County clerk as required under CPLR §5020. Although, Ms. Herskowitz procured a copy of the satisfaction of judgments and they were authenticated by the late Mr. Delibert and Mr. Windels at an oral argument on June 21, 2004 they were not marked into evidence and were simply disregarded.

As acknowledged by Mr. Delibert in his September 28, 1995 affirmation the judgment entered by default against defendants XXXX and XXX Herskowitz on November 22, 1993 in the principal sum of \$3,264,963.33 with prejudgment interest of \$986,984.52 for the total sum \$4,251,947.87 it was the same as the default judgment entered against Judith Herskowitz on January 21, 1994 in the same principal sum of \$3,264,963.33 with prejudgment interest of \$1,035,061.12 in the total sum of \$4,300,024.42 (A- 172) Also see, May 29, 2003 Affirmation of Delibert (A-31) The judgments (A-156 and A-160) arose out of the same alleged injury, but were entered at different times because of a bankruptcy stay for Judith Herskowitz. Noted in the satisfaction pieces is the fact that the judgments were "wholly paid" and

under New York law of joint and several liability it discharged all the jointly liable judgment of debtors, Judith, XXXX and XXX Herskowitz and extinguished the judgments. By disregarding that full satisfaction of judgment Charney would collect twice on the same judgment.

**Mr. Windels Was to Hold the Surplus Funds Only as “Neutral Custodian”**

The final judgments of November 1993 and January 1994 made no provision to continue Mr. Windels as permanent receiver of the assets of North Jersey Trading Corporation. By Order to Show Cause dated September 28, 1995 Ms. Charney moved for appointment of a post-judgment receiver strictly pursuant to CPLR §§ 5228, 5105 and 6401 for enforcement of the derivative judgment against property of judgment debtor, and “to provide a **neutral fiduciary** to receive the surplus which might” be transferred from the New Jersey bankruptcy court (A-168 and A-172) upon which a November 25, 1995 order was entered.

In the Affirmation in support of the motion Charney’s attorney Steven Delibert acknowledged in ¶5 that although Mr. Windels was appointed

“temporary receiver of the New York property of North Jersey Trading Corporation”....Mr. Windels ”never assumed control over any property of the corporation, because “**pre-empted** by the virtually simultaneous appointment of a receiver in one of several mortgage foreclosures then pending, Nathanson v. North Jersey Trading Corp., Supreme Court, New York County Index No. 9134/91” and by the “subsequent pendency of the bankruptcy proceeding in New Jersey, and control of the

corporation's assets by the trustee therein" (Emphasis supplied)

This is why Mr. Windels had never taken an oath, never posted a bond and never served as temporary receiver of the North Jersey assets under that May 21, 1991 order. In ¶6 of his Affirmation, Mr. Delibert acknowledged that the automatic bankruptcy stay was lifted only for

“the express purpose of permitting her [Charney] to seek enforcement of the judgments entered on behalf of the corporation, subject to the requirement that the proceeds of such enforcement be delivered to the Bankruptcy Trustee”.

So, that the automatic stay was not lifted to allow even the appointment of a post-judgment receiver for purposes of enforcement of that derivative judgment on behalf of North Jersey. Mr. Delibert further acknowledged in ¶ 7 of his Affirmation that the sole property of North Jersey, a 54 unit apartment building on Riverside Drive New York City was sold by the Bankruptcy Court on August 31, 1994 and the proceeds of the sale [\$2,925,000.00] were retained and administered by the Trustee.

In ¶9 all that was sought was a custodian for the funds that remained from the sale, when and if it were released by the Bankruptcy Court, and in ¶¶ 7, 8 it would be to hold those funds pending determination of the “disputes” between Charney and Judith Herskowitz (a majority shareholder of North Jersey) on the facts that:

“..... substantially all creditors have been paid; and the Trustee has informally estimated that at least several hundred thousand dollars will remain for distribution to shareholders..... The Bankruptcy Court

has expressed its unwillingness, however, to involve itself in the disputes among the shareholders, with which it is not familiar. It would accordingly be appropriate for that Court to return any remaining proceeds to the jurisdiction of this Court, where the disputes among those parties originated; and Charney intends to move for such relief, at the appropriate time.”

In ¶13, Charney through Mr. Delibert requested the Court to give Mr. Windels

“the power to take and hold such assets as may be released by the Bankruptcy Court, before requesting that Court to so release the funds”(¶ 9) and assured that these funds “would still be subject to the orders of the New Jersey Bankruptcy Court”.

A November 24, 1995 order for that post judgment receiver was entered on the September 28, 1995 motion, in which it was provided that

“all of the said powers of the said Receiver shall be subject and subordinate to such orders as may issue from the United States Bankruptcy Court for the District of New Jersey in the matter entitled In re North Jersey Trading Corp., No. 93-31620-SA”

**The Bankruptcy Court Was Asked by Charney to Abstain and to Transfer the Surplus to Mr. Windels for Determination for Distribution to Shareholders**

To transfer the surplus funds to Mr. Windels, Charney induced the Bankruptcy Court to abstain from distributing the surplus funds to the shareholders. The Motion for Abstention (A-183 and A-185) was supported with an Affidavit of Mr. Delibert sworn to on July 18, 1996, in which it was acknowledged that all claims and administrative expenses would be paid in the Bankruptcy Court prior to the transfer,

that was for the purpose to resolve disputes between shareholders,

“there is no occasion for this Court to attempt to determine the validity of the New York decision declaring Charney to be a shareholder, or for this Court to undertake, itself, to determine the identity of the shareholders, or to wait for some other court to do so. As shown in the accompanying memorandum of law, this court should determine to abstain from undertaking any such unnecessary decision.” ( pg. 6, ¶ 14)

“The facts have now changed substantially. The significant debts -- primarily, the mortgages -- and many administrative expenses have been paid, and the remaining claims and anticipated administrative expenses, even if paid in full, would account for barely half the cash now in the hands of the Trustee. Clearly, there is no reason now for this Court to intrude itself further in the state court litigation; there is no likelihood that the proceeds thereof, if any, will be needed to satisfy the debtor's obligations or the expenses of administration herein; there is no reason for this Court to burden itself with still further assets of the debtor, whose ultimate disposition could only embroil this Court still further in the disputes between the factions of shareholders and the state courts of New York and Florida.” (pg. 9, ¶19)

Thereupon, the Bankruptcy Court granted Charney’s motion and on November 13, 1996, entered an order of abstention, upon the stipulation to litigate those matters in the New York court on the state law issues. (A-191)

### **The Counsel Fees Were Litigated and Were Disposed in the Bankruptcy Court**

The \$4 million derivative judgment was reported by the Trustee in her Monthly Report and was considered to be an asset of the debtor North Jersey The Bankruptcy Court entered a number of rulings on fee claims of Charney’s attorneys. One of these

at the August 3, 1994 hearing on Charney's Motion for Relief from the Stay, (A-194) to allow her to pursue domestication of her New York judgments in Florida wherein the Court ruled on Mr. Delibert's application for fees as follows:

**“only if, he and his client succeed in recovering something there, for the benefit of the estate, and if and only if they make an application under code section 503B(3) and B(4), for rendering a substantial contribution to the case. Would they arguably have a basis for being compensated by the estate, for their services. So essentially, they're proceeding at their own cost and their own risk”** (Emphasis supplied)

In her fee applications in the Bankruptcy Court pursuant to 11 U.S. §503(b)(4) as an administrative expense for professional services rendered, Charney acknowledged that attorney's fees could be awarded (A-197) only in the event that -

“in realizing any actual recovery on behalf of debtor with respect to the derivative action judgments, the right is respectively reserved to make application to this Court at that time for further compensation”.

A first application for fees was granted by order dated March 20, 1995 awarding her counsel Mr. Delibert the sum of \$19,692.20 for counsel fees and \$3,096.95 for expenses. A second application was granted by order dated September 11, 1995 awarding Mr. Delibert the sum of \$24,310.00 for fees and \$2,862.72 for expenses. Charney has not collected any funds on the derivative judgments in the Florida Court. When she made a Third Application for Fees, it was rejected in a May 2, 1997 order of the Bankruptcy Court ruling (A-200) as follows:

“This is the Court's response to your motion for allowance of fees and

expenses under Code section 503(b)(3)(D), authorizes the court to allow compensation and reimbursement of expenses to an attorney for a creditor or equity security holder in a chapter 11 case where such professional makes a “substantial contribution” to the case. You haven’t submitted a memo on the standards for determining “substantial contribution” in this Court, which you should have. The mere fact that such allowances have been made by this Court before does not mean that they will continue to be made indefinitely.

Moreover, you note that one of the motions for which you seek such compensation was denied by this Court. It is difficult to understand how that could constitute a substantial contribution within the meaning of the subject standard. In addition, your client’s challenges to the actions taken by the Herskowitzes in Florida to invalidate the New York judgments **appear to be primarily for your client’s benefit rather than for the benefit of the estate.**” (Emphasis supplied)

**The Surplus Was Transferred Upon Payment of All Claims and Administrative Expenses and Was on Condition that it Was for the Shareholders**

On November 24, 1999 the Trustee moved in her Motion to Conclude Trustee’s Administration and to Dismiss Case”(A-202) in which she certified that the surplus was for shareholders:

“The Trustee currently holds the sum of \$868,077.38 in her Trustee account for this estate. Even assuming that none of the claims challenges filed by the Trustee were granted, there would be a substantial surplus of funds available to the shareholders of the debtor following payment of administrative and other creditors in full.....The surplus funds held by the Trustee will ultimately be distributed to the prevailing shareholder in the New York and Florida litigations, and Paul Windels, Esq., has been appointed receiver in the New York litigation and is available to hold the surplus funds pending conclusion of that litigation.”

In her December 10, 1999 response, Charney through Delibert joined in

support of Trustee's motion (A-206) wherein she asserted that the transfer to the New York court was essential because

“there remain bitterly contested issues between Susan Charney and Judith Herskowitz, as to who is entitled to the surplus remaining on behalf of the debtor.”

Charney further buttressed her position by asserting that because the issues on the Settlement Agreement were outside the Bankruptcy Court then to -

“what extent the settlement violated any provision of New York law was an appropriate resolution for the New York court .”

The Bankruptcy Court entered its “Order Granting Trustee's Motion to Conclude Administration and Dismiss Case and Directing Transfer of Funds” dated August 9, 2000 (A-209). The Trustee transferred the surplus funds of \$682,225.89 to Mr. Windels, upon assurances that it belonged to the North Jersey shareholders for adjudication in the New York court of their rights therein between Judith Herskowitz and Susan Charney.

**No Turnover Order Exists for \$4 Million; the Turnover Order Was Only on a \$5,000 Money Judgment and the North Jersey Stock Certificates Had a Value Far in Excess of \$5,000, Additionally These Judgments Were Fully Satisfied**

That denial of standing to Ms. Herskowitz to foreclose her from objecting to “Mr. Windels' submission of his final accounting as Receiver of North Jersey, and his request for commission pursuant to B.C.L. §1217” were based upon facts in that

March 23, 2006 order (A-142) that were wholly unsupported by the court's own record. Ms. Herskowitz was denied standing because:

"Herskowitz is neither a creditor or shareholder. To the contrary, Herskowitz owes in excess of \$4 million to North Jersey, as there has been a judicial determination that Herskowitz must turn over her shares in North Jersey to the Sheriff of New York County." See *Matter of Herskowitz v. Tompkins* Index No. 12002/92 (S.Ct. N.Y.Cty. Sept. 18, 1992)

However, by this Court's own description the assertion of lack of standing is unsupported and is contrary to the record. The court below notes the date of that turnover order as September 18, 1992, (A-211) whereas that \$4 million judgment is dated January 21, 1994. Since that turnover order predates that 1994 judgment by almost two years that 1992 turnover order was clearly not issued on that \$4 million judgment.

That turnover order was directed to an August 1992 money judgment entered for \$5,000.00 in another case under Index No. 23002/92 (A-214), whereas the matters related here only to a case under Index No. 24517/88, individually for Charney for fees for Mr. Delibert. Moreover, CPLR §5225 allows the court to order the judgment debtor to pay the judgment creditor so much of the money as is sufficient to satisfy the judgment, or to deliver so much of the personal property as is sufficient value to satisfy the judgment. This order was entered while North Jersey still owned the apartment building. So, obviously this was an unlawful attempt to

confiscate the entire 54 unit apartment building for \$5,000.00. Additionally that September 18, 1992 turnover order was entered without service of a motion on Ms. Herskowitz and so was issued *ex parte*. At any rate a full satisfaction of judgment was also executed on that \$5,000.00 judgment entered jointly against the Herskowitzes (A-217).

**No Ruling Was Made On the Extensive Documentary Evidence showing that the \$4. 2 Million Dollar Default Judgment Was Entered on Referee's Findings Based Only on Plaintiff's ex Parte Submissions Comprised of Fraudulent Presumptions and Were Entered Without a Determination of Personal Jurisdiction over Ms. Herskowitz and Without Proof of Service**

Ms. Herskowitz moved to vacate that \$4 million default judgment supported with her affidavit sworn to on July 9, 2007 (A-221) The motion was supported with documentary evidence, upon which no hearing was set and no evidence was taken. Not only was the motion denied without a hearing on the voluminous evidence, in a June 8, 2005 order, but Ms. Herskowitz was foreclosed from filing any papers without prior permission of the court, which of course was not given. This motion to vacate was unopposed by Charney. Mr. Windels filed an Affirmation in Opposition stating that he had a limited participation in the case and that he has not been directly involved in that aspect of the litigation, and so he did not oppose the motion (A-234).

It was shown in that motion that the \$4 million judgment by default was entered against the Herskowitzes, by foreclosing them from defending against any and all of Charney's claims. Charney was declared to be a shareholder of North Jersey, without the required proof. Also without the required proof of fiduciary misconduct, the case was set down before a referee, but only as to the amount of the damages. The Herskowitzes were excluded from that Inquest with invalid orders of sanctions, so that a \$4 four million derivative judgment would be entered without opposition, by default.

Attached to the motion to vacate was a Post Inquest Memorandum dated March 15, 1993, which conclusively demonstrated that the \$4.2 million Default Judgment was entered on referee's findings at a March 1, 1993 Inquest, based solely on Charney's ex parte submissions. That Memorandum attributed the alleged wrongdoing to XXXXHerskowitz, and shows no involvement by Ms. Herskowitz in the management, but put the blame on them when as shown by the excluded evidence, the rent roll backs occurred when the property was managed by Fried. The evidence further shows that the damages consisted of a fictionalized loss of rental income, illegally inflated rent rolls; with rents stated as if there never were any vacancies, as if the rents were increased based upon substantial capitol improvement, for which no capitol was made available, and on a claim of misuse of mortgage proceeds without

taking into consideration, that it was used to pay off a prior mortgage.

That fabricated diversion of income was claimed from January 1985 to February 1993 when Alex Fried was alive, and it also included the period from May 1991, when the mortgagee's receiver took over. Wholly omitted was any income for Alex Fried the father of Charney, for the last ten years of his life. Thereby, placing the responsibility for his support on the Herskowitzes. Upon Charney's own admission in a May 13, 1996 deposition the income from the corporation belonged to Alex Fried and so there was nothing to take for Ms. Herskowitz nor was there proof that she ever did. Charney's testimony was as

“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.”

The said record further shows that the judgments had been entered by default, without determination of service and long arm jurisdiction under CPLR §302 over Herskowitz a non-resident domiciled in Florida, made essential because of the territorial limitation of the New York court. There was only an October 2, 1991 order (**Exhibit 19**) entered without the required traverse hearing, that was predicated upon that the Herskowitzes have withdrawn their jurisdictional claim and so were

prohibited to raise the jurisdictional issue. Thereupon, their motion to dismiss addressed to the jurisdictional issues was never ruled upon.

At all times Charney's counsel Mr. Delibert was fully aware that the jurisdictional defenses were not withdrawn. On December 29, 1993 Mr. Delibert personally appeared in the Bankruptcy Court in Florida, in a case of Ms. Herskowitz (dismissed at a later date) in which Mr. Delibert testified, and acknowledge that it was unsupported by the record of the New York court that the Herskowitzes withdrew their objections to personal jurisdiction, and so was untrue.

"Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXX Herskowitz, XXXXHerskowitz 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."

Not surprisingly, missing from these \$4 million default judgments is the requirement pursuant to CPLR 3215(f) the "proof of service of the summons and complaint". 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. (A-160 and A-237) 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”, rendering these judgments void on their face. The admissions of Mr. Delibert and the default judgment entered without proof of service should have terminated Charney’s litigation against Herskowitz fifteen years ago.

Enumerated in the Argument are the various controlling principles of law upon which the court below erred or were misapplied or were not applied.

## ARGUMENT

### **I. THE SUPREME COURT ERRED IN APPROVING THE ACCOUNTING BASED UPON A PREARRANGED DISTRIBUTION OF THE SURPLUS THAT WAS BARRED BY THE PROCEEDINGS AND ORDERS OF THE BANKRUPTCY COURT UNDER PRINCIPLE OF RES JUDICATA.**

The court held in *The Insurance Company of the State of Pennsylvania, v HSBC Bank USA*, 10 N.Y.3d 32; 882 N.E.2d 381; 852 N.Y.S.2d 812 (2008) that a creditor who has seized a debtor's bank account was entitled to res judicata effect in a subsequent state court proceedings where the issue was that a portion of the funds in the account were state tax proceeds that should not have been part of the bankruptcy estate. Since the parties had notice of the bankruptcy action, that they failed to alert the court that the funds at issue were tax receipts held in trust, they could not challenge in state court that court approved seizure of the funds. The court engaged in a detailed discussion of the principles of res judicata some of which are as follows:

“The doctrine of res judicata, or claim preclusion, is designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"

..... Res judicata "applies with full force to matters decided by the bankruptcy courts . . . in a Chapter 7 liquidation where it is desirable that matters be resolved as expeditiously and economically as possible" ..

.....Federal res judicata law applies to not only issues actually litigated, but also to "issues that . . . could have been raised" in the prior action

.....Indeed, deciding who is entitled to the property of an insolvent debtor is a central function of a bankruptcy court. Significantly, no new facts beyond those that were available in the Bankruptcy Court are needed to determine the answer in this case.”

The proceedings and orders of the Bankruptcy Court in the within case have been set forth in detail. It was an error for the court, to make its rulings as if that surplus fund was the result of a liquidation upon Charney’s derivative suit. When in fact those funds remained from the sale of the North Jersey real property in the Bankruptcy Court, and its distribution was restricted for the benefit of shareholders. Accordingly, Charney and her attorneys were not at liberty to divide those funds as they predetermined. It was an abuse of discretion to deprive Herskowitz of that surplus by the simple expedience of making her travel from Florida to New York for an undefined hearing on a motion in the Supreme Court that was barred by the prior orders and proceedings of the Bankruptcy Court under principles of res judicata.

That derivative judgment was an asset of the debtor in the Bankruptcy Court, Charney submitted herself to the jurisdiction of the Bankruptcy Court and was bound by its rulings on the fees as was the Supreme Court. That derivative judgment on behalf of North Jersey was an asset of the Bankruptcy Court pursuant to 11 U.S.C. §541 and the related fees were an administrative expense under 11 U.S.C. §503. All

creditors and administrative expenses were paid which included Charney's attorney Mr. Delibert. The Bankruptcy Court released those funds upon an order of abstention on assurance that the rights of the shareholders to those funds would be litigated in the Supreme Court. Not only was it not litigated, but Herskowitz was abused with a fabricated default, with orders of sanctions and denial of standing, to eliminate her from the artificial proceeding on that prearranged distribution of the surplus.

## **II. THE COURT ERRED IN FAILING TO RECOGNIZE THE FULL SATISFACTION OF THE JUDGMENT FOR ITS LEGAL EFFECT AND TO XXX THEM INTO EVIDENCE**

Totally omitted from the instant orders is any reference to the full satisfaction of the judgments that included the fees. Herskowitz raised this issue in her papers, but it was disregarded, and no hearing was ever accorded to put the satisfaction piece into evidence. It has been acknowledged by Ms. Charney that these judgments are based on the same injury, the damages are unapportioned between the defendants and Judith, XXXXand XXX Herskowitz, were made jointly answerable for the wrongs alleged against them. The common law of joint and several tort liability is still the law of the New York, which is binding on the Supreme Court, holding that

"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 (2<sup>nd</sup> Dep't 1939) *Makeun v. State of New York*, 98 A.D. 2d 583; 471 N.Y.S.2d 293, 297 (2<sup>nd</sup> 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.” Also see, *Rock v. Reed-Prentice Division of Package Machinery Co.*, 39 N.Y. 2d 34; 346 N.E.2d 520; 382 N.Y.S 2d.720, 723;(1976); *Blanco v. J & H Associates* 177 A.D. 2d 370; 576 N,Y,S, 2d 124 (1st Dep’t 1991) holding that once the judgment is satisfied it is deemed to constitute the plaintiff’s election of his or he remedy...and a claim inconsistent with that election may not thereafter be asserted.

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].” (Emph. supplied), which would be a partial satisfaction in the form of a release See, *Practice Commentary* by Vincent C. Alexander, to McKinney's CPRL C1401:6, 1996. Section 15-108 specifies that this does not apply to settlements after judgment because, "the purpose of Section 15-108 is to encourage settlement when a tortfeasor's obligations have not yet been determined. After judgment, this purpose is no longer operative."

Accordingly, there was no basis upon which pursue Judith Herskowitz on that \$4 million derivative judgment, because it was extinguished upon the full satisfaction issued in May 1999.

### **III. THE COURT ERRED IN ALLOWING WINDELS TO PROCEED AS RECEIVER OF THE DEFENDANT NORTH JERSEY TRADING CORPORATION WHERE THERE IS NO STATUTORY PROVISION FOR A GENERAL RECEIVER OF A FOREIGN CORPORATION**

The issues raised here are jurisdictional that have not been resolved although it has been presented in the court below and so it can be raised at any time. In the instant October 23, 2006 order Mr. Windels purports to act in the capacity of Receiver “who was appointed Receiver of defendant North Jersey Trading Corporation by Order of this Court dated May 21, 1991”. Mr. Windels engaged in his publication of notices in the same capacity. North Jersey is a foreign corporation incorporated in the State of New Jersey and under its laws. The courts of the state of New York do not have jurisdiction to appoint a general receiver of a foreign corporation. The court may appoint only a receiver of the property of the foreign corporation to preserve its assets in this state. *Acken v. Coughlin*, 103 App. Div. 1, 92 N.Y.S. 700 (1<sup>st</sup> Dept. 1905) B.C.L. §1202 provides four types of actions for appointment of receiver only one of which applies to a foreign corporation namely § 1202(a)(4) in **an action to preserve the assets in this state** under the circumstances as specified under that statute.

It is not within the power of the litigants to invest a court with any jurisdiction

or power not conferred on it by law. It is a well established 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 (3<sup>rd</sup> Dept. 1931). It has been further held that where the court acquires no jurisdiction, its judgment is a nullity, and will be so treated as such 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)

*Meyer v. Perograd Metal Works*, 256 A.D. 1077, 11 N.Y.S.2d 125 (2<sup>nd</sup> Dept.

1939) 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.”

Therefore, the proceedings and orders entered by the Supreme Court wherein

Windels purports to act as “Receiver of defendant of North Jersey Trading Corporation appointed by order dated May 21, 1991” are wholly without subject matter jurisdiction, which renders the October 23, 2006 order as well as the publication of his notices null and void. Moreover, Mr. Windels was never appointed as the “Receiver of the defendant North Jersey Trading Corporation” under that May 21, 1991 order, but as “temporary receiver of the property of North Jersey Trading Corporation”.

**IV. THE COURT ERRED IN APPROVING THE FINAL ACCOUNT OF WINDELS AND ALLOWING HIM TO PROCEED AS RECEIVER OF THE “PROPERTY OF NORTH JERSEY TRADING CORPORATION APPOINTED BY A MAY 21, 1991 ORDER” WHEN NORTH JERSEY HAD NO PROPERTY WITHIN THE STATE, WINDELS HAS TAKEN NO OATH AND POSTED NO BOND AND THE SURPLUS CAME INTO HIS HAND AS A NEUTRAL CUSTODIAN**

The appointment of temporary receiver is provided under B.C.L. §1203(a) only before final judgment. To continue that receivership that appointment has to be made pursuant to B.C.L. 1206(a) in the final judgment as a permanent receiver.

It is well settled that the appointment of a receiver of a foreign corporation is an action in rem, and requires that the corporation have property within the state. *Meyer v. Perograd Metal Works*, 256 A.D. 1077, 11 N.Y.S.2d 125 (2<sup>nd</sup> Dept. 1939) N.Y.Jur. 2d *Receivers* Section 120. Where the corporation had no assets within the

state, there was no jurisdiction to appoint receiver of the property. In the *Application of Burge* 282 App.Div. 219, 122 N.Y.S.2d 232 (1<sup>st</sup> Dept. 1953) . *Pennoyer v. Neff* , 96 U.S. 714, 722, 727 (1878), is still the controlling law on jurisdiction in this country. The court made clear that the property must exist at the time of the order or judgment is entered and cannot be applied retroactively after judgment.

Windels acknowledges that he has never served under that temporary receivership in the May 21, 1991 pre-judgment order because of “the prior appointment of a receiver acting on behalf of the mortgage lender in a foreclosure proceeding” (pg. 4 par. 4). Based upon BCL §1218(a)(10) the court ruled in *Hershbaum v. Compania Petrolera Trans-Cuba* 215 N.Y.S.2d 898 (Supr. Ct. Kings Cnty, 1961) 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. Accordingly, Windels Article 12 receivership under the May 21, 1991 order was extinguished before it could come into existence. After the North Jersey property was sold in August 1994 no in rem jurisdiction existed within New York upon which to appoint Mr. Windels as receiver of North Jersey assets.

**A. The Court Erred in its June 27, 1997 order in Placing the Burden of Herskowitz to Object to Windels' Lack of Qualification**

It is undisputed in the June 27, 2007 order that Mr. Windels never qualified by taking an oath and by posting a bond under the May 21, 1991 order of appointment. B.C.L. §1204 places the burden on a receiver to qualify. Under well settled authorities where a receiver failed to qualify he is not a party in the action. *Maki v. Estate of Ziehm*, 55 A.D.2d 454, 391 N.Y.S.2d 705 (3<sup>rd</sup> Dept. 1977) Where a receiver fails to qualify he was not entitled to assume control over assets and could not collect rents. *Manufacturers' Trust Co. V. Sadenet Realty, Inc., v. Weiss*, 234 App.Div. 893, 254 N.Y.S 428 (2<sup>nd</sup> Dept. 1931) and even if receiver was duly appointed could not enter upon his duties until he qualified. *Morris v. Davis* 219 N.Y.S. 2d 279 (Supr. Ct.Kings Cty 1961)

The Court misapprehended *McCabb v. Porter Air-Lighter Co.*, 44 A.D. 102, 104-106 (1<sup>st</sup> Dept.1899) because it was not the qualification of receiver that was in question. Nor was there any burden on Herskowitz to object at the time of his appointment in 1991 for his failure to qualify. Windels made no attempts to serve due to the appointment of the foreclosure receiver, which was acknowledged in Delibert's September 28, 1995 affirmation (A-172).

Under well settled authorities where a receiver failed to qualify he is not a party

in the action. *Maki v. Estate of Ziehm*, 55 A.D.2d 454, 391 N.Y.S.2d 705 (3<sup>rd</sup> Dept. 1977) Where a receiver fails to qualify he was not entitled to assume control over assets and could not collect rents. *Manufacturers' Trust Co. V. Sadenet Realty, Inc., v. Weiss*, 234 App.Div. 893, 254 N.Y.S 428 (2<sup>nd</sup> Dept. 1931) and even if receiver was duly appointed could not enter upon his duties until he qualified. *Morris v. Davis* 219 N.Y.S. 2d 279 (Supr. Ct.Kings Cty 1961)

**B. 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 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 likewise 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. also 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.

**V. THE COURT ERRED IN ACTING BEYOND ITS TERRITORIAL JURISDICTION WHERE NO DETERMINATION ON PERSONAL JURISDICTION WAS MADE UNDER STATUTORY REQUIREMENTS**

The basic rules on the territorial limitation of State courts was laid also 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 and to pursue her with

that \$4 million default judgment, to deprive her of assets. .

In *Knapp v. Shoemaker* 82 A.D. 2d 15, 442 N.Y.S. 2d 287 (4<sup>th</sup> 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 motions were never ruled upon. At issue here is a \$4 million judgment by default upon which Herskowitz was never heard.

Moreover, that default judgment was entered without proof of service as required pursuant to CPLR §3215(f). Recited on page 3, of the January 21, 1994 judgment is only that "the proof of due service of said Motion on each of the defendants" referring to the service of an "Order to Show Cause dated January 6, 1994 (A-236). That was a motion served by first class mail.

This makes Charney's non-compliance with the proof prerequisite under CPLR 3215(f) by failing to "file proof of service of the summons and the complaint" a fundamental defect that by virtue of former CPLR 304 it deprived the court of jurisdiction to enter any judgment in this case. It is well settled that the failure to comply with the requirements of CPLR 3215 for entry of a default judgment renders a judgment a nullity and must be vacated. In *Marazita v. Nelbach*, 91 A.D. 2d 604, 456 N.Y.S.2d 423,(2<sup>nd</sup> Dept. 1982) upon the failure to properly file proof of service the court held that:

"Where a default judgment is entered without compliance with the necessary requirements therefor that judgment is a nullity and must be vacated".

In accord *Pack v. Saldana* 178 A.D.2d 123, 577 N.Y.S.2d 12 (1<sup>st</sup> Dept. 1991) and *Mc. Dermott v. Hoenig* 32 A.D.2d 838, 302 N.Y.S.2d 280 (2<sup>nd</sup> Dept. 1969)

Since the burden of proof was on Plaintiff on the service of process, which she failed to meet, she did not establish the procedural prerequisite for her default judgments, are fatally defective. The judgments are a nullity and are void ab initio pursuant to CPLR 3215(f) for the court's lack of jurisdiction to enter it. It is to be noted that Judith Herskowitz's prior §5015(a) motion raised jurisdictional challenges based on the lack of personal jurisdiction on the default judgment entered by Justice Tompkins on January 21, 1994.

**CONCLUSION**

For the foregoing reasons, the Orders appealed from should be reversed so as to remand to the lower court for the taking of evidence , so that the appeal may proceed on a record and not be limited to the face of the orders.

Dated: Miami Beach, Florida  
July 1, 2008

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**PRINTING SPECIFICATION STATEMENT**

I Judith Herskowitz, Defendant-Appellant appearing pro se, hereby certify that this brief is in compliance with 600.1(d)(1)(v) of the Rules of the Appellate Division, First Department. The Brief was prepared using Word Perfect 11. The typeface is Times New Roman. The main body of the brief is in 14 pt. The brief contains 9.301 words as counted by the word processing program.

Dated: Miami Beach, Florida  
July 1, 2008

By: \_\_\_\_\_  
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