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

SUSAN CHARNEY, New York County
Index No. 24517/88

Plaintiff - Respondent

-against-

JUDITH HERSKOWITZ,

Defendant - Appellant

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

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE AND SET ASIDE THE SEPTEMBER 2, 2008 ORDER DISMISSING THE APPEAL

STATE OF FLORIDA)
) SS.:
MIAMI-DADE COUNTY)

Appellant JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. That I make this affidavit on personal knowledge, in support of my motion to Vacate and Set Aside the September 2, 2008 Order Dismissing the Appeal (Exhibit 1). This Court granted the motion of Paul Windels III, to dismiss the appeal I have taken from the July 27, 2007 order of Justice Sherry Klein Heitler entered on August 1, 2007 (Exhibit 2). This Court's order was without an opinion, and without a stated ground for the dismissal. Mr. Windels argued for dismissal on the basis that the July 27, 2007 order of Justice Heitler denied Herskowitz's motion to reargue the October 26, 2006 Order to Settle Receiver's Account and to Discharge Receiver, and "since the denial of a motion

for reargument is not appealable, this Court has no jurisdiction to hear Herskowitz's appeal."

2. The appeal from the July 27, 2007 order was set for the October 2008 term. I had already filed my Initial Brief, together with an extensive Appendix and a Note of Issue with the required fees, and Windels filed his Answer Brief. I was in the midst of preparing my reply brief, due on September 13, 2008, when I was informed by a clerk of this court on September 5, 2008 that my appeal was dismissed. This prevented me from rebutting Mr. Windels' Brief. As a result the dismissal was not based upon the briefs and the record, but was limited to the face of the July 27, 2008 order, without a determination on the record that my motion was a reargument of the October 26, 2006 order. (Exhibit 3)

3. The October 26, 2006 order makes clear that Judith Herskowitz was defaulted for having "failed to appear before the Court on September 11, 2006 in support of her objections" and so her objections were rejected. Accordingly, these objections were not heard, and so, no decision was made on these objections to furnish a basis for denying my motion to renew and to vacate the October 26th order as "reargument". By granting that October 26th order by defaulting me for failure to appear, the order was made unappealable and the appeal lies from the July 27, 2007 order. Apparently, this order was insulated from appellate review by the simple expedient of the insertion of the word "reargument".

4. Moreover, B.C.L. §1216(c) requires the objections to the accounting to be heard in an evidentiary hearing, but no such hearing was set by the court. When I called this to the attention of the court, the court substantially altered its October 26, 2006 order,

from rejecting Herskowitz's objections for failure to appear, to holding that she lacked standing. In response to my motion that there is no provision for a receiver of the corporation under B.C.L. §1202, the court further altered that October 23, 2006 order, from holding that Windels is the "Receiver of defendant North Jersey Trading Corporation" to holding that Windels is the "Receiver of the property of North jersey Trading Corporation" but, it was acknowledged that Windels has not qualified at the time of the May 21, 1991 order of appointment. Thus, the July 27, 2007 order furnished new grounds for an appeal.

5. Furthermore, in that July 27, 2008 order, the court below relied upon its own version of the facts and artificially created circumstances. These were that the assets of North Jersey Trading Corporation ("North Jersey") were liquidated upon plaintiff Susan Charney having prevailed in her underlying shareholder's derivative action. That, Charney through her attorney Steven Delibert had the authority to move on or about June 2003, for an order to distribute the funds [in the sum of $682.225.89] for counsel fees on the derivative judgment as was prearranged out of court which funds were "held by the appointed Receiver of the property of North Jersey". Herskowitz was defaulted when she did not appear in court on Charney's motion and her papers were rejected. That prearranged plan of distribution was then approved in the April 13, 2004 order. Herskowitz's motion to vacate the default was denied in an order dated October 12, 2004. Windels moved for judicial settlement of his distribution to "creditors" of North Jersey pursuant to B.C.L. §1216(c), and published notices in newspapers. The October 26, 2006

order settled Windels Accounting, but rejected Herskowitz's objections for failure to appear. In the July 27, 2007 order it was acknowledged that Herskowitz's objections were not heard because she has no standing inasmuch as she is not an interested party, because she owes $4 million to North Jersey and there has been a determination that she must turn over her North Jersey shares to the Sheriff of New York County.

6. The court makes clear in its orders that the objective was to eliminate Herskowitz, in order to approve that distribution of the surplus without any opposition and to avoid making a determination based upon the record and applicable law. The court relied upon conflicting grounds, on the one hand that Herskowitz had defaulted, which signifies that she was an interested party who failed to appear, and on the other hand that Herskowitz is not an interested party, and so has no standing to participate in a hearing. Accordingly, even if I had appeared on that day in November 2003, my papers would have been rejected for alleged lack of standing. Charney's counsel Steven Delibert contrived that default against me by threatening me that, if I appeared in court I would be arrested, and although a suspension order was issued by the court it was calculated that I would not receive it timely, to be able to make travel arrangement from Florida to New York.

7. The underlying record was disregarded by the court in the July 27, 2007 order and since this Court dismissed the appeal on the face of the July 27th order, it was also without consideration of the record. Reference is made herein to the documents that were included in my Appendix and Brief. The evidence and record that was omitted from

the orders, contradicts the version of the facts in the July 27, 2007order and prior orders. That record and evidence shows, that the North Jersey real property was liquidated in the New Jersey Bankruptcy court in a Chapter 11 Voluntary Bankruptcy case and not in the New York Supreme Court. The $4 million derivative judgment was an asset of the bankruptcy estate and all counsel fees relating to it were adjudicated in the bankruptcy court. Furthermore, that there was a full satisfaction of judgment on that derivative judgment which included the fees, and so that $4 million judgment was extinguished.

8. Yet another issue, unsupported by the record is the receivership of Mr. Windels. In the October 26, 2006 order as well as in this Court's September 2, 2008 order dismissing the appeal, Mr. Windels was referred to as the "appointed receiver of the defendant North Jersey Trading Corporation". In the July 27, 2007 order Mr. Windels is referred to as "the appointed Receiver of the property of North Jersey Trading Corporation", and in his motion to dismiss this appeal Mr. Windels claims that he is the,

> "Receiver of the assets of defendant North Jersey Trading Corporation ('North Jersey") pursuant to an order of the Supreme Court, New York County, dated May 21, 1991, which was affirmed by this Court, *Charney v. North Jersey Trading Corp*., 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dept. 1992), which appointment was continued by an Order of the Supreme Court for New York County dated November 21, 1995 which order was entered on or about November 24, 1995."

9. There is no statutory provision for a receiver of the corporation under B.C.L. Article 12, §1202, which provides only for "appointment of receiver of property of a domestic or foreign corporation". Windels admits in ¶6 of his affirmation in support of

his motion to dismiss that following his May 21, 1991 appointment he was prevented from serving as receiver on account of the prior appointment of receiver for the same North Jersey property in a foreclosure proceeding and by the subsequent appointment of a bankruptcy trustee. So, that it is undisputed that Windels has never taken an oath and never posted a bond and never served as receiver under that May 21st order of appointment.

10. Windels then attempts to rely upon a November 24, 1995 order as having continued him as Receiver. However, the court below failed and refused to take judicial notice of the September 23, 1995 motion by Order to Show Cause, upon which that November 24, 1995 was entered. That motion was made after that derivative judgment by default was entered in November 1993 and January 1994, which did not continue Windels as receiver of the assets of North Jersey. The North Jersey property a 54 unit apartment building in New York City, at 200 Riverside Drive, was sold in August 1994 by the New Jersey bankruptcy trustee for close to $3 million, and trustee retained the proceeds. Since those assets were under control of the trustee in New Jersey, there were no assets within the state of New York upon which to appoint Windels as receiver.

11. It was made clear in the September 23, 1995 Order to Show Cause, that Charney moved strictly pursuant to CPLR §§ 5228, 5105 and 6401 for appointment of a post-judgment receiver and to "provide a **neutral fiduciary** to receive the surplus which might" be transferred from the New Jersey Bankruptcy court (A-168). So, there was no application under B.C.L. Article 12. In the supporting affirmation to that motion it was

made clear in ¶¶ 7,8 that this would be to hold those funds pending determination of the "disputes" between Charney and Judith Herskowitz for distribution to the shareholders (A-172). It was upon an order of abstention entered on these assurances that the surplus funds of close to $700,000 was transferred to the custody of Windels in August 2000. It was further acknowledged that all creditors of North Jersey were paid in the bankruptcy court and the surplus was free and clear of all claims (A-183 to A-209).

12. I was thrust back into the New York court, almost a decade after that derivative judgment by default was entered. That transfer of that surplus turned out to be a deceptive ploy to prevent the bankruptcy court from distributing the surplus to the North Jersey shareholders. Windels secreted those funds for three years and never moved for distribution to the shareholders. However, he could not just abscond with it. So, Charney through her counsel the late Steven Delibert joined with Windels resorted to an Order to Show Cause procured ex parte on May 29, 2003, as a post-judgment proceeding so that the court below would put its stamp of approval on the distribution of that surplus (A-28 and A-31). That distribution was prearranged as to the sums that Charney and her attorneys and Windels would receive as alleged counsel fees,[1] without regard that the fees were already determined and disposed in the bankruptcy court.

13. Although, I submitted papers in opposition, the rallying cry was to eliminate

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[1]The surplus was divided, as reimbursement of fees of $110,000.00 to Susan Charney, to the 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, all of which fees were stated as a lump sum, unsupported with time sheets,

me, to deprive me of my rightful share in that surplus, a majority shareholder of North Jersey. The default that was contrived against me, was mischarcterized as willful, to grant Charney's motion without opposition in an April 13, 2004 order, and to adhere to it as if it were written in stone. Mr. Windels was directed to file an accounting under B.C.L. §1216. Mr. Windels engaged in a charade by publishing notices of appointment, 13 years after his 1991 appointment as temporary receiver, which never came into existence and after he had already distributed the North Jersey surplus without any claims presented.

14. That Herskowitz lacked standing was based upon a misconception of the record that she owes in excess of $4 million to North Jersey for which she was to turn over her shares in North Jersey. The omitted record shows that the turnover order was entered *ex parte* in 1992 without notice and hearing on a $5,000.00 money judgment in another case, that was wholly unrelated to that $4,000.000 derivative judgment entered by default in 1993 and 1994. 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. This order was entered while North Jersey still owned the apartment building. Obviously, this was yet another scheme to confiscate the entire 54 unit apartment building for $5,000. At any rate there was a full satisfaction on that $5,000 judgment as well as on that $4 million judgment, and so these judgments were extinguished and existed no longer, which was likewise disregarded (A-215 and A-217).

15. The insertion of the word "reargument" into the order to make it unappealable

is dejavu". That is what occurred on a prior appeal to this Court from an October 2, 1991 order of Justice Harold Tompkins. It was ruled in that order, without holding the required traverse hearing, that the Herskowitzes have withdrawn their jurisdictional claim and so were prohibited to raise their jurisdictional defenses. That order was entered on the Herskowitzes' motion to dismiss. Although the personal jurisdictional issues were never ruled on the merits, the motion was deemed by Justice Tompkins to be reargument and the appeal was dismissed as unappealable. *Charney v. North Jersey Trading Corp*., 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dept. 1992). The Herskowitzes also petitioned the First Department to direct Justice Tompkins to hear the jurisdictional issue. That application was not only denied, but upon Charney's motion sanctions were imposed and a money judgment was entered against the Herskowitzes as noted above for $5,000.00.

16. At all times Charney's counsel Mr. Delibert was fully aware that these jurisdictional defenses have not been withdrawn. On December 29, 1993 Mr. Delibert personally appeared in a Florida court proceeding and testified under oath, and acknowledged that there was no record in the New York court to support that the Herskowitzes have withdrawn their objections to personal jurisdiction, and so it was untrue.

17. Nevertheless, it was upon that $5,000 judgment that the sanction order was entered, upon which that *ex parte* turnover was entered to require the Herskowitzes to hand over all their North Jersey shares, and was used against me in the instant July 27, 2007 order, to to eliminate me for having no standing to object to that prearranged

appropriation of the North Jersey surplus. It was also upon that sanction order that no defense was allowed to Charney's derivative claim , and so that $4 million judgment was entered on a prior contrived default. I moved to vacate that $4 million default judgment supported with an affidavit and documentary evidence showing that the damages were based on a fabricated loss of rental income, underestimated and omitted expenses, plus $1.2 million prejudgment interest, $1.3 loss of value of the property (without any prior appraisal) and the alleged damage of $200,000 was used to pay off a mortgage on the North Jersey property. Likewise omitted was any income for Alex Fried who purchased and managed that property, who was the father of Charney and Herskowitz. In a May 13, 1996 deposition Charney acknowledged in sworn testimony that all income belonged to Fried and she never received any income or dividends. This was also disregarded.

18. The omitted record further shows that the derivative judgments by default had been entered without a determination of long arm jurisdiction over Herskowitz a nonresident domiciled in Florida made essential under CPLR §302 because of the territorial limitation of the New York court. Further missing from the $4 million default judgment is the requirement pursuant to CPLR § 3215(f) a proof of service of the summons. Those judgments made reference only to " the proof service of said Motion on each of the defendants" on pages 2 and 3 respectively. (A-160 and A-237) which was nothing, but a motion that was served by mail, rendering those judgments void.

WHEREFORE, Appellant respectfully requests that her motion be granted in all

respects vacating and setting aside this Court's September 2, 2008 order dismissing the appeal and that this matter be heard on the record and evidence.

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JUDITH HERSKOWITZ

SWORN to before me
this 29th day of September, 2008

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Notary Public - State of Florida