

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.

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE  
AND SET ASIDE THIS COURT'S SEPTEMBER 2, 2008 ORDER**

This Memorandum of Law is filed in support of the motion of Appellant Judith Herskowitz to vacate and set aside the September 2, 2008 order of this Court dismissing the appeal from the July 27, 2007 order of Justice Sherry Klein Heitler entered on August 1, 2007. Since the appeal was not heard, there is no decision upon which to seek a re-hearing. The order of dismissal was issued without an opinion, was limited to the face of the July 27, 2007 order, without a review of the record and without specifying any reason or, ground for the dismissal. The order was granted on motion of Paul Windels III, who argued in his motion that this Court is without jurisdiction to hear Herskowitz's appeal, from the July 27, 2007 order "since the denial of a motion for reargument is not appealable".

By inserting the word “reargument” into that July 27<sup>th</sup> order, so that it would be insulated from appellate review, Herskowitz was denied the right to appeal. The Court erred in entering its dismissal order without an examination of the record in a plenary appeal as to whether there was a reargument of the October 26, 2006 “Order To Settle Receiver’s Account and to Discharge Receiver”. The October 26<sup>th</sup> order shows that it was entered upon default of Herskowitz, her objections were rejected for nonappearance so, there was no prior decision to be reargued. Furthermore, to settle receiver’s accounting was not a matter to be heard on oral argument, but B.C.L. §1216(c) requires the court to set an evidentiary hearing, to hear objections and proof, but no such hearing was set to furnish an opportunity to be heard on the objections for the court to make a decision.

As shown in the accompanying affidavit, the decision of the court below, was not to make a decision based on the record and evidence, but to enter orders to eliminate Herskowitz, so that orders would be entered without opposition on that prearranged distribution of the entire surplus funds of North Jersey in the sum of \$682,225.89 for fees. Defaults were contrived against Herskowitz written in stone, and was denied standing that she is not an interested party. The court below failed and refused to receive evidence and testimony and to take judicial notice of the record and of the law. The court fashioned its orders on altered facts and on misinterpreted law for a pretense that the surplus funds were distributed in a proceeding pursuant to Article 12 of the Business Corporation Law.

As part of that elimination process Herskowitz was discredited, her good name

was destroyed with ad hominem attacks and she was accused of engaging in acts that never happened. All this was smoke and mirrors to wipe out North Jersey to the last penny and to deprive Herskowitz of her rightful share in that surplus as a majority shareholder. There was to be no objection to Windels' accounting on his distribution of the North Jersey surplus. That accounting was only upon Windels' unsupported declarations, who has never taken an oath and never posted a bond to serve as receiver of the assets of North Jersey, and so he was unauthorized to engage in any distribution of that North Jersey surplus to non-existent creditors of North Jersey.

Windels, a politically well connected attorney, acted merely as a conduit for the transfer of the surplus, upon fraudulent representations that it would be distributed to shareholders in the New York court. Instead the surplus was distributed as fees to attorneys as prearranged, in proceedings conducted under color of law. For that Herskowitz was required to travel four times from Florida to New York. She was then given no more than a ten minute oral argument, in which the court refused to take evidence, saying it was not an evidentiary hearing, but then failed and refused to set an evidentiary hearing, so that no record would be created.

Obviously, so as not to expose these faux orders entered without any support in the record, evidence and applicable law, and to protect its participants, Herskowitz was denied appellate review. This comes in face of the policy of the New York Commission on Judicial Conduct that it will not pursue a complaint on the merits, because the remedy

lies by appellate review. So, that the art of misappropriation of property has been perfected, without any accountability and without any fear of reprisal, protected under judicial immunity and the appellate court looking the other way. When the court below was presented with the well settled requirement of judicial notice of the law and of the record, the Justice looked down from the bench and simply uttered “I will enter my order and mail it to you”, and that is how that July 27, 2007 order came into existence.

As a consequence thirty years of hard work was wiped out. It began in 1988 with a lawsuit based on pure fiction in the New York court, to take over the entire corporation with its valuable real property a 54 unit apartment building at 200 Riverside Drive N.Y.C, which had only \$200,000 mortgage at the time. With a \$5,000 money judgment Charney’s attorney Steven Delibert demanded all the stocks of North Jersey, and then procured a \$4 million judgment by default on false claims.

Armed with this faux weaponry, the Herskowitzes were pursued in three states, New York, New Jersey and Florida by Mr. Delibert with a battery of attorneys he retained whose stock in trade is to churn out legalese falsities, to feast on other people’s money, until there is nothing left. North Jersey was driven into bankruptcy, the business was lost with its real property, and although that \$4 million derivative judgment was fully satisfied including fees, and all the corporate funds were depleted, Herskowitz would still owe \$4 million. The American Dream was turned into the American Nightmare, in the process destroying Herskowitz’s earning capacity and irreparably harming her.

## ARGUMENT

### **“REARGUMENT” THE CATCHALL TO FORECLOSE APPELLATE REVIEW**

It is well settled that on an appeal the court reviews the decision of the lower court based upon the record. A dismissal on the ground that the order denied a motion to reargue rests on the principle that the questions were previously decided. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 719, 472 N.Y.S.2d 971 (1<sup>st</sup> Dept. 1984) This principle was reiterated in *McGill v. Goldman*, 361 A.D.2d 593, 691 N.Y.S.2d 75 (2<sup>nd</sup> Dept. 1999) not allowing reargument on “issues previously decided”.

The October 26, 2006 order expressly rejected Herrskowitz’s objections and opposing papers for “having failed to appear before the Court on September 11, 2006 in support of her objections”. CPLR §3215(a) defines a default as failure to appear, which was the ground upon which the October 23, 2006 order was granted. Herrskowitz also moved to vacate the October 26, 2006 order pursuant to CPLR §5015, to vacate the default. It is well settled that no appeal lies from an order granted upon default, but only from the order denying motion to vacate the default. 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)

Even as to a motion to renew there is no hard and fast rule. A court may also grant a motion to renew in the interest of justice, even upon facts known to the movant at the time the original motion was made *Liberty Mut. Ins. Co. v Allstate Ins. Co.*, 237 A.D.2d

260, 654 N.Y.S.2d 403 (1997) *Vayser v Waldbaum, Inc.*, 225 A.D.2d 760, 640 N.Y.S.2d 179 [1996] The requirements on a motion to renew are not inflexible and the Court has held that even if the vigorous requirements for renewal are not met, such relief may still be properly granted so as not to "defeat substantive fairness" (*Metcalfe v City of New York*, 223 A.D.2d 410, 411, 636 N.Y.S.2d 60 [1996]).

Furthermore, no hearing was ever set on the disputed issues of fact to be heard on evidence and testimony. It is provided under CPLR §2218 that any issue of fact arising on a motion is to be tried by the court or by a referee. This Court has the authority to remand the case to the court below, to hold an evidentiary hearing to take proof to aid in the determination of matters on appeal. In *State v. Wolowitz*, 96 A.D.2d 47, 468 N.Y.S.2d 131, 146 (2<sup>nd</sup> Dept. 1983) the court had remanded the case to the lower court, for the purposes of holding an evidentiary hearing to take proof, which was also the case in *Bouchardeau v. Bouchardeau* 63 A.D.2d 975, 405 N.Y.S.2d 769 (2<sup>nd</sup> Dept. 1978)

**SUMMARY AND HIGHLIGHT OF THE WELL SETTLED LAW  
THAT WAS DISREGARDED BY THE COURT BELOW AND  
REQUIRES A PLENARY APPELLATE REVIEW**

The objective on this motion is not to argue the appeal. Appellant had submitted A Brief, and an Appendix for that purpose. It is to show that the appeal could not be disposed on a motion on the face of that July 27, 2007 order, and requires a determination based upon the record and applicable law.

## **1. Requirement of Judicial Notice of the Law and of the Record**

Pursuant to CPLR § 4511 and common law adoptions a court is required to take judicial notice of the law and of the record . It is the fundamental hornbook law that a court take judicial notice of its own records. *Casson v. Casson*, 107 A.D.2d 342, 486 N.Y.S.2d 191, 192 (1<sup>st</sup> Dept. 1985) The appellate court made reference not only to documents in the record on appeal before the court, but also of documents on a prior appeal. Also see, *Jean-Louis v. 345 Riverside Drive Apartment Corp.*, 259 A.D.2d 402, 687 N.Y.S.2d 104 (1<sup>st</sup> Dept. 1999)

In *MJD Construction, Inc. v. Woodstock Lawn & Home Maintenance, Inc.*, 293 A.D. 2d 516, 740 N.Y.S.2d 402) the court held that the Supreme Court is to take judicial notice of the record and of the judgment in the related bankruptcy proceeding. In *Peter B. Weiss v. Michael Hagopian*, 251 A.D.2d 400, 674 N.Y.S.2d 123, the court held judicial notice of the record applied for purposes of res judicata and collateral estoppel as to matters that were litigated and rulings made by the bankruptcy court.

## **2. Res Judicata Effect of the Bankruptcy Court Proceedings on the Subsequent State Court Proceedings**

The res judicata effect of the bankruptcy court proceedings on the subsequent state court proceedings was firmly established in a recent decision of the Court of Appeals 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) the court holding that

“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 surplus funds were not received by Windels for a free for all, but upon orders of abstention of the bankruptcy court for determination for distribution to shareholders.

That scheme for distribution of the surplus for fees, came out of nowhere. The 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 and were already determined and disposed in the bankruptcy court. Moreover, the division of fees

master-minded between plaintiff’s attorneys is prohibited under 18 U.S.C. §155 as follows:

“whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined under this title or imprisoned not more than one year, or both”.

### **3. The Effect of the Full Satisfaction of Judgment Under the Common Law of Joint and Several Liability of New York**

There was no \$4 million derivative judgment upon which to distribute that North Jersey surplus as fees. That judgment was fully satisfied. A full satisfaction of that judgment was given upon payment of \$150,000.00 in a settlement by XXXX and XXX Herskowitz that included all fees and interest and extinguished that \$4 million derivative judgment entered by default in November 1993 against XXXX and XXX Herskowitz and in January 1994 against Judith Herskowitz. These judgments were based on the same injury, the damages were unapportioned between the defendants Judith, XXXX and XXX Herskowitz, and they were made jointly answerable for the wrongs alleged against them.

The common law of joint and several tort liability is still the law of New York. Although with joint and several liability the plaintiff is free to pick and choose the tortfeasors against whom she wishes to proceed or to enforce the judgment

"satisfaction of a judgment rendered against one tort-feasor discharges all joint tort-feasors from liability to the plaintiff."

*Blanco v. J & B Associates*, A.D.2d 370, 576 N.Y.S.2d 124 (1<sup>st</sup> Dept. 1991) relies upon Restatement of Judgments §95. It is further held that

“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) 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." Although 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) 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." N.Y. 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].

#### **4. Requirements of Business Corporation Law Under Article 12 and Provisions of Federal Bankruptcy Code**

Mr. Windels assuming to act in the capacity of "Receiver of the assets of North Jersey Trading Corporation" and alternatively as "Receiver of the defendant North Jersey Trading Corporation" is unsupported by statutory provisions under B.C.L. Article 12. First of all B.C.L. §1202 provides only for receiver of the property of a domestic or foreign corporation. A temporary receiver is appointed under B.C.L. §1203(a) only before final judgment. To continue that receivership the appointment has to be made pursuant to

B.C.L. 1206(a) in the final judgment as a permanent receiver. Mr. Windels was appointed only as a temporary receiver of the assets of North Jersey under a May 21, 1991 order. Mr. Windels acknowledged his appointment as receiver was preempted by the appointment of a foreclosure receiver under and by subsequent appointment of a bankruptcy trustee, under and so has not qualified under that May 21<sup>st</sup> order by taking an oath and posting a bond. His appointment was not continued by that final derivative judgment entered in November 1993 and January 1994. The North Jersey real property was sold by the trustee in August 1994 and the trustee retained the proceeds in a New Jersey bank account. All assets of North Jersey came under plenary control of the bankruptcy court pursuant to 11 U.S.C. §541(a) and state court could not appoint a receiver under 11 U.S.C. §105(b).

The appointment of receiver is an action in rem and requires property within the state at the time the order of appointment is entered and cannot be applied retroactively. *Pennoyer v. Neff*, 96 U.S. 714, 722, 727 (1878); and *Application of Burge* 282 App.Div. 219, 122 N.Y.S.2d 232 (1<sup>st</sup> Dept. 1953) .

A receiver who has not qualified 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) and is 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) 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)

### **5. Mr. Windel's Actions as Receiver of the Defendant North Jersey Trading Corporation Was Wholly Without Subject Matter Jurisdiction**

Since the statutory provision for receiver under Article 12 is only for receiver of property, the acts undertaken by Mr. Windels as “receiver of the defendant North Jersey Trading Corporation” were wholly without subject matter jurisdiction. *Meyer v.*

*Perograd Metal Works*, 256 A.D. 1077, 11 N.Y.S.2d 125 (2<sup>nd</sup> Dept. 1939) described subject matter jurisdiction 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.....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.”

Since Mr. Windels engaged in the publication of notices and represented himself in the October 26, 2006 order as “receiver of the defendant North Jersey Trading Corporation” that alone renders that October 26, 2006 order void. Moreover, the property of a foreign corporation within the state may be used only to satisfy the claims of the citizens of the state. *Stephen v. Zivnostenska Bank, National Corporation*, 140 N.Y.S 2d 323 (Supr. Ct. N.Y. Cty. 1955) There was no extraterritorial jurisdiction, 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.

## 6. Territorial Limitation of State Courts

Plaintiff has never met her burden of proof on personal jurisdiction over Herskowitz. The court never dealt with the issue that Herskowitz, a non-resident, domiciled in Florida is well beyond the territorial boundaries of this Court. No analysis of long arm jurisdiction was conducted under CPLR §302 and of the minimum contact requirements under the Fourteenth Amendment to United States Constitution, to subject her to the jurisdiction of this Court and to pursue her with that \$4 million default judgment, to deprive her of assets.

*Pennoyer v. Neff* 95 U.S. 714 (1877) is still the authority on territorial limitation of the State courts holding that:

“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)

Also see: In *Knapp v. Shoemaker* 82 A.D. 2d 15, 442 N.Y.S. 2d 287 (4<sup>th</sup> Dept. 1981) and see, *Royal Zenith Corporation v. Continental Insurance Company*, 63 N.Y.2d 975, 483 N.Y.S.2d 993 (1984) \_The only order that was entered was that October 2, 1991 order that was induced by false representations of plaintiff’s counsel that the Herskowitzes have withdrawn their jurisdictional claim, which at a later date in a December 29, 1993 testimony Mr. Delibert conceded was unsupported by the record and was false.

Moreover, that \$4 million default judgment was entered without proof of service as required pursuant to CPLR §3215(f) and is void on that additional ground.

WHEREFORE, by reason of the foregoing, it is respectfully requested that the September 2, 2008 Order Dismissing the appeal from the July 27, 2007 order be vacated and set aside so that a plenary appeal may proceed in this cause, together with such other and further relief as maybe just and proper.

Dated: September 29, 2008  
Miami Beach, Florida

Respectfully submitted,

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