

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

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:
SUSAN CHARNEY, :
:
Plaintiff-Respondent, : New York County
:
- against - : Index No. 24517/88
:
JUDITH HERSKOWITZ, :
:
Defendant-Appellant, :
:
and :
:
NORTH JERSEY TRADING CORPORATION, :
ALEXANDER FRIED. :
:
Defendants. :
:
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MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO VACATE ORDER DISMISSING APPEAL

Respondent Paul Windels III, 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 Dep’t 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, respectfully submits this Memorandum of Law in opposition to the motion of defendant-appellant Judith Herskowitz (a) to vacate this the September 2, 2008, Decision and Order of this Court (Mazzarelli, Buckley, Acosta, Renwick, DeGrasse, JJ.) dismissing the appeal herein and (b) to reinstate her appeal.

This Court's September 2, 2008, Order granted the Receiver's motion to dismiss Herskowitz's appeal of the July 27, 2007, Decision and Order of the Supreme Court for New York County (Heitler, J.) (the "July 27 Order") on the ground that the July 27 Order was a denial of reargument of the Supreme Court's October 26, 2006, Order (the "October 26 Order").¹ This Court (Tom, Andrias, Nardelli, Sweeny, JJ.) had previously dismissed Herskowitz's appeal of the October 26 Order after she had failed to perfect it for the February 2008 Term.²

The Receiver will not burden this Court with a detailed repetition of the facts demonstrated and arguments made in his prior motion, which provide more than sufficient grounds for this Court's September 2, 2008, Order.³ In seeking to vacate this Court's Order, Herskowitz does not and cannot contest the facts that, as the Receiver demonstrated in those papers, mandated dismissal of her appeal:

¹ The October 26, 2006, Order approved the Receiver's accounting, granted him fees and expenses, and granted his motion to be discharged.

² See Order dated March 25, 2008 (M-639 slip op.). This Court had previously granted Herskowitz's motion for an enlargement of time to perfect that appeal to the February Term by Order dated October 18, 2007 (No. M 4754 slip op.). On January 25, 2008, nearly two months after the December 3, 2007, filing deadline for the February 2008 Term, Herskowitz moved for a further enlargement of time. This Court's March 25, 2008, Order denied that motion and dismissed the appeal of the Supreme Court's October 26, 2006, Order.

³ The Receiver respectfully refers the Court to his Affirmation and Memorandum of Law both dated July 23, 2008, which he submitted in support of that motion and which are on file with the Court for a full documentation of the facts relevant to this motion. Those papers will be referred to in this Memorandum as "Windels Aff." and "7/23 Memo.", respectively.

- a. That the Supreme Court granted the Receiver's motion for approval of his accounting and to be discharged by the October 26 Order, which was marked as a final determination;⁴
- b. That Herskowitz filed a Notice of Appeal of the October 26 Order but failed to perfect that appeal;⁵
- c. That this Court dismissed Herskowitz's appeal of the October 26 Order on March 25, 2008, and denied Herskowitz's motion to restore that appeal on July 1, 2008;⁶
- d. That, as found by the Supreme Court, the Receiver had made no payments of any sort other than pursuant to prior Orders of the Supreme Court that were never appealed;⁷
- e. That, as found by the Supreme Court in its March 23, 2006, Opinion and Order, Herskowitz lacked standing to object to the Receiver's accounting because she was (i) under Court Orders – again never appealed – to turn over all of her shares in North Jersey to the Sheriff of New York County and (ii) a judgment debtor for over \$4 million to North Jersey pursuant to a judgment she has never appealed;⁸

⁴ See Windels Aff. Ex. B. The October 26 Order is expressly marked as a "final" disposition on its cover sheet.

⁵ See this Court's (Tom, Andrias, Nardelli, Sweeny, JJ.) March 25, 2008, decision in this case (M-639 slip op.) denying Herskowitz's motion for a retroactive enlargement of time and *sua sponte* dismissing her appeal.

⁶ *Id.* This Court denied a further motion by Herskowitz – based on her outrageous and false allegation that the Receiver had forged Charney's name to their joint memorandum responding to her January 25 motion – on July 1, 2008 (M-2317 slip op.)

⁷ See Windels Aff. ¶¶ 10-14.

⁸ See Windels Aff. Ex. J at 2-3.

f. That this appeal is taken from the July 27 Order of the Supreme Court, from which this appeal was taken, denied Herskowitz's motion "to vacate and renew" the October 26 Order "in its entirety";⁹

g. That Herskowitz offered no facts in support of her motion to "renew and vacate" the October 26 Order that she had not and could not have raised in her prior opposition to the Receiver's accounting, with the result that, as found by the Supreme Court in the July 27 Order, her motion was actually for reargument of the October 26 Order;¹⁰ and

h. That, in denying her motion "in its entirety" the Supreme Court denied reargument of its prior, final October 26 Order.¹¹

As set forth in the 7/23 Memo., at 9-11, the denial of reargument is unappealable as a matter of black letter law, and this Court properly dismissed Herskowitz's appeal of the July 27 Order. *Morris Heights Health Center v. Della Pietra*, 38 A.D.3d 261, 262, 834 N.Y.S.2d 9 (1st Dep't 2007) ("To the extent that the . . . defendants raised claims in a subsequent motion . . . which could have been raised in response to plaintiff's initial motion, the . . . Defendants were seeking to reargue the first order, denial of which was unappealable"); *Johnson v. Ford*, 33 A.D.3d 529, 823 N.Y.S.2d 67 (1st Dep't 2006) ("Since plaintiffs did not submit any new or additional facts, the motion court correctly determined that the second motion was really a

⁹ See Windels Aff. Ex. A.

¹⁰ See Windels Aff. Ex. A at 4-5.

¹¹ See *id.*, at 5.

motion to reargue . . . and denied it as such. The denial of a motion to reargue is not appealable”).¹²

In seeking to vacate this Court’s September 2 Order, Herskowitz contends (a) that the October 26 Order was entered on her default and that she therefore could not appeal that Order but had to move to vacate it and (b) that her motion “to vacate and renew” was in fact a renewal motion notwithstanding her failure to offer any new facts in support of that motion. Not only are both of Herskowitz’s arguments specious, the September 2 Order is mandated on a separate ground: the dismissal of her appeal of the October 26 Order for failure to prosecute precludes her from arguing any point she might have raised on that appeal under *Rubeo v. National Grange Mutual Insurance Co.*, 93 N.Y.2d 750, 697 N.Y.S.2d 866, 720 N.E.2d 286 (1999).

A. The October 26 Order was not Entered on Default

Herskowitz pretends that the Supreme Court’s October 26 Order somehow defaulted her, with the result that she had to move to vacate that Order in order to appeal it. The October 26 Order was entered as a final Order – and Herskowitz appealed it to this Court.¹³ Moreover, the Supreme Court did accept Herskowitz’s papers objecting to the Receiver’s accounting, heard oral argument from her on January 23, 2006, and overruled Herskowitz’s objections by Decision and Order dated March 23, 2006.¹⁴ The October 26 Order expressly stated that it was based “UPON the affirmation and Memorandum of Law of Judith Herskowitz, both dated September

¹² Were that not the case, a party could evade the time periods for taking appeals simply by filing endless motions for reargument and appealing the denial of those motions. The rule thus speaks to the appellate jurisdiction of the Court.

¹³ Her appeal of October 26 Order was dismissed by this Court on March 25, 2008. See page 3, notes 5-6, supra.

¹⁴ Windels Aff. Ex. J.

26, 2005, in opposition to the Receiver's motion for approval of his accounting and discharge," and "UPON the presentation made by the Receiver of his account before the court on January 23, 2006, and the presentation by Judith Herskowitz of her objection to the Receiver's accounting" among other things.¹⁵ The Court separately noted that Herskowitz had "served purported additional objections . . . on or about August 30, 2006, which date is after the September 30, 2005 return date of the Receiver's motion" but had "failed to appear before the Court on September 11, 2006, in support of her objections as required under the rules of this Court" and therefore ordered that "the objections served by Judith Herskowitz are rejected for the foregoing reasons".¹⁶ The Supreme Court had further found in its initial March 23, 2006, Decision and Order on the Receiver's motion (which was subsumed in the October 26 order)¹⁷ that Herskowitz lacked standing to object because of the outstanding and unappealed Order that she turn over her shares in North Jersey to the Sheriff and \$4 million judgment against her, and overruled Herskowitz's objections on the merits in that same Decision.¹⁸ What the Court below rejected was a *second* set of purported objections served by Herskowitz on or about August 30, 2006 – *eleven months after* the September 30, 2005, return date of the Receiver's motion for approval of his accounting.¹⁹

¹⁵ Windels Aff. Ex. B at 1-2.

¹⁶ Windels Aff. Ex. B at 2-3.

¹⁷ See Windels Aff. Ex. B at 2. Nowhere in her papers does Herskowitz acknowledge the existence of the March 23 Decision and Order

¹⁸ See Windels Aff. Ex. J at 2-4.

¹⁹ In addition to holding that Herskowitz lacked standing to object to the Receiver's accounting, the March 23 Order directed the Receiver to give further notice to the Attorney General of New York and publish further notice of the presentation of his accounting and

Herskowitz's own brief submitted on this appeal in July 2008 dispels any doubt that the October 26 decision rejected Herskowitz's opposition to the Receiver's accounting on the merits and was not a default.²⁰ Under CPLR 5015(a)(1), a party seeking to vacate a default must show both a reasonable excuse for the default and a valid defense on the merits. *See e.g., Kanat v. Oscher*, 301 A.D.2d 456, 456-57, 755 N.Y.S.2d 371 (1st Dep't 2003) (party seeking to vacate default bears the burden of establishing "both a reasonable excuse for the default and a meritorious defense to the action"). Yet nowhere does her brief to this Court make any such argument and her appendix contains not one scintilla of evidence establishing a reasonable excuse for such a default.²¹ To the contrary, given her pattern of defaults throughout twenty years of this litigation, the Supreme Court would have been well within its discretion in finding that she had offered no valid excuse for her default. *See Windels Aff. Ex. C at 3-6, Ex. D at 2-3.* As this Court held in *Back v. Stern*, 23 A.D.2d 837, 259 N.Y.S.2d 538 (1st Dep't 1965), where "there is no showing of any adequate excuse for the default – to the contrary it appears to have been a deliberate one . . . such defects mandate a denial of the motion" to vacate. Under numerous decisions of this and other Courts, the establishment of a pattern of defaults presents

directed that any objecting parties show cause on June 26, 2006 (which date was adjourned to September 11, 2006) why the accounting should not be allowed. *See Windels Aff. Ex. J.* Neither the Attorney General nor any other party objected. Herskowitz, whose objections had already been overruled and whom the Court had already held lacked standing to object, then purported to file additional objections to the accounting but then failed to appear at the September 11 hearing. Given that the Court had already overruled her objections and held that she lacked standing, its purpose in holding the September 11 hearing was to determine if any other interested party had any objection to the accounting, not to give Herskowitz a second bite at the apple.

²⁰ A copy of the table of contents of that brief was reproduced for the convenience of the Court as Exhibit K to the Windels Affirmation.

²¹ *See Windels Aff. Ex. K.*

compelling evidence that the defaults were deliberate. *E.g., Collins v. Bertram Yacht Corp.*, 53 A.D.2d 527, 384 N.Y.S.2d 186 (1st Dep't 1976), *aff'd*, 42 N.Y.2d 1033, 399 N.Y.S.2d 202, 369 N.E.2d 758 (1977) (“plaintiff’s default was not inadvertent; it was part of a pattern of default”); *Conserve Elec. Inc. v. Tulger Contracting Corp.*, 36 A.D.3d 747, 831 N.Y.S.2d 185 (2d Dep’t 2007) (“repeated failure of defendants’ attorney to appear on scheduled trial dates demonstrates a pattern of wilful neglect”); *Robinson v. Saw Mill Works, Inc.*, 265 A.D.2d 604, 696 N.Y.S.2d 277 (3d Dep’t 1991) (“defendants’ overall pattern of noncompliance and delay gave rise to an inference of wilful and contumacious conduct on their part”); *Henderson v. Stilwell*, 116 A.D.2d 861, 498 N.Y.S.2d 183 (3d Dep’t 1986) (“history of delay and evasion on the part of plaintiffs . . . clearly supported an inference that plaintiffs’ conduct was . . . wilful and contumacious”).

Not only has Herskowitz provided no excuse for her supposed default in either the brief she filed with this Court or in this motion, the July 27 Order itself does not address any issue of a default with respect to the October 26 Order. *See Windels Aff. Ex. A.* Herskowitz’s failure to argue that any default on her part in connection with the October 26 order was excusable thus disproves beyond peradventure any argument that she might make that the July 27 decision is appealable as a denial of a motion to vacate such a default.²²

²² None of the cases cited by Herskowitz have any bearing here, where the Court heard oral argument from Herskowitz on January 23, 2006, and considered her objections filed prior to the return date of the motion, as demonstrated by the March 23 Decision and Order and October 26 Order, but declined to accept a second set of objections on the same motion served nearly a year after the original return date of that motion. *See Windels Aff. Ex. B.* Both *Diaz v. New York Mercantile Exchange*, 1 A.D.3d 242, 768 N.Y.S.2d 5 (1st Dep’t 2003), and *Matter of Belinda “OO”*, 210 A.D.2d 853, 620 N.Y.S.2d 1020 (3d Dep’t 1994), involved actual defaults. In *Katz v. Katz*, 68 A.D.2d 536, 418 N.Y.S.2d 99 (2d Dep’t 1979), the defendant was afforded the opportunity to appeal the denial of vacatur of his default with respect to issues that he had not had the opportunity to contest as a result of his default. Here, where Herskowitz filed objections to the Receiver’s accounting and argued them on January 23, 2006, she was not deprived of the opportunity to argue anything.

B. Herskowitz Failed to Offer any new Facts to Support a Renewal Motion

Equally unavailing is Herskowitz's contention that, despite her failure to offer any new facts in support of her motion to vacate the October 26 Order, the Supreme Court should have granted renewal "in the interests of justice" and that she should therefore be permitted to appeal. Even now, after the dismissal of her appeal, she does not identify a single new fact that she brought (or could have brought) to the Supreme Court's attention when she moved "to renew and vacate" the October 26 Order, much less a valid excuse for failing to offer those facts on the Receiver's original motion.²³ The Supreme Court below thus correctly found that Herskowitz's motion was for reargument and its denial of reargument cannot be appealed. *See Garner v. Latimer*, 306 A.D.2d 209, 761 N.Y.S.2d 657 (1st Dept. 2003) ("a motion for leave to renew is intended to direct the court's attention to new or additional facts which . . . were unknown to the movant" at the time of the original motion); *Cuccia v. City of New York*, 306 A.D.2d 2, 761 N.Y.S.2d 31 (1st Dept. 2003) ("an application to renew must be based upon additional material facts which existed at the time that the prior motion was made but were not then known to the party seeking leave to renew and a valid excuse must be offered for not supplying such facts").

Herskowitz cannot massage the facts and circumstances of this case to fit within the narrow exception to this rule so as not "to defeat substantive fairness" as articulated in cases like *Metcalf v. City of New York*, 223 A.D.2d 410, 636 N.Y.S.2d 60 (1st Dep't 1996), *Liberty Mut. Ins. Co. v. Allstate Ins. Co.*, 237 A.D.2d 260, 654 N.Y.S.2d 403 (2d Dep't 1997), or *Vayser v. Waldbaum, Inc.*, 225 A.D.2d 760, 640 N.Y.S.2d 179 (2d Dep't 1996). That exception is

²³ Much less in connection with the motion for distribution of funds, which was granted in the April 13 and October 12, 2004, Decisions and Orders of the Supreme Court below and which Herskowitz never appealed.

reserved for egregious situations²⁴ such as confronted this Court in *The Rancho Santa Fe Ass'n v. Dolan-King*, 36 A.D.3d 460, 829 N.Y.S.2d 39 (1st Dep't 2007), in which the Supreme Court had denied the petitioner's application for a sheriff's sale of the respondent's property based on a California judgment based on the Supreme Court's apparently *sua sponte* determination that the California judgment was defective. As this Court noted "no issue regarding personal jurisdiction was raised by the respondent, and the motion court should not have delved into the issue of whether the notation by the California court clerk was properly added" 36 A.D.2d at 461-62, 829 N.Y.S.2d 39. The Court therefore had no alternative in order to prevent a miscarriage of justice but through renewal. *See also Metcalfe v. City of New York* (motion to renew based on facts unknown to the movant at the time of the original motion).

This case by contrast offers no parallel to those extraordinary circumstances under which Courts allowed renewal without the requirements for renewal being met. Herskowitz could have raised the same issues she seeks to raise in her appeal of the July 27 Order on her appeal of the October 26 Order. She chose not to perfect that appeal. She could have raised those same issues by appealing the Supreme Court's April 13 and October 12, 2004, Decisions and Orders directing the distribution of the funds held by the Receiver. She chose not to take an appeal, notwithstanding that the October 12 Decision and Order was marked as a final determination. She could have appealed the Supreme Court's June 8, 2005, denials of her motion to vacate the order that she turn over her shares to the Sheriff of New York County in *Herskowitz v. Tompkins*, and the \$4 million judgment against her in this case. Again she chose not to appeal. Having passed up appellate relief time and time again throughout this litigation, Herskowitz

²⁴ This exception must by definition be narrow, otherwise parties could use it to attempt end runs around the jurisdictional requirements for taking appeals.

cannot now ask this Court to bend its rules in order to afford her the same appellate relief that eschewed.²⁵

C. Herskowitz's Failure to Perfect her Appeal of the October 26 Order Bars her Appeal From the July 27 Order

Even if Herskowitz had a valid motion to renew the October 26 Order, this Court's dismissal of her appeal of the October 26 Order for failure to prosecute separately mandates dismissal of her appeal of the July 27 Order. Directly on point is the decision of the Court of Appeals in *Rubeo v. National Grange Mutual Insurance Co.*, 93 N.Y.2d 750, 697 N.Y.S.2d 866, 720 N.E.2d 286 (1999). In *Rubeo*, the plaintiff appealed an order granting summary judgment against him and simultaneously moved for reargument of that order. The Supreme Court granted reargument and, on reargument, adhered to its prior decision and the plaintiff appealed the Supreme Court's decision on reargument as well. The plaintiff failed, however, to perfect his appeal from the initial decision granting summary judgment and the Appellate Division dismissed that appeal for failure to prosecute. The Appellate Division then dismissed the plaintiff's appeal from the decision on reargument – notwithstanding that an appeal would ordinarily lie from that decision – on the ground that the plaintiff could have raised the same issue on his prior appeal which he had abandoned.

²⁵ Herskowitz also contends that the July 27 decision and Order somehow modified the October 26 Order. That the July 27 Decision and Order denied her motion "in its entirety" (Windels Aff. Ex. A at 5) dispels that argument. Similarly her suggestion that the Supreme Court's October 12, 2004, Decision and Order – which was also marked as a "final" disposition (Windels Aff. Ex. D) – was not final because the Receiver still had to file his accounting ignores the fact that that Decision and Order was a final determination with respect to the distribution of funds to be made by the Receiver, and which the Receiver had to make before presenting an accounting. Otherwise, the Receiver would be placed in the impossible position of having to make distributions under a plan that was still subject to appellate review.

The Court of Appeals affirmed the dismissal of the second appeal. The Court held: “If an appeal has been dismissed for failure to prosecute, any subsequent appeal raising an issue presented by the first appeal is subject to dismissal.” 93 N.Y.2d at 754. As the Court further explained, “If no penalty were imposed for failing to prosecute an earlier appeal, litigants could use the appellate process as a means of delaying enforcement of judgments and the inevitable payment of just debts and obligations.” *Id; accord, Combier v. Anderson*, 34 A.D.2d 333, 333-34, 824 N.Y.S.2d 276 (1st Dep’t 2001) (“we decline to review issues involving the order that granted defendants partial summary judgment in view of the dismissal of plaintiff’s appeal from that order for failure to prosecute”); *Whiteman v. Teminich*, 255 A.D.2d 378, 679 N.Y.S.2d 708 (2d Dep’t 1998) (dismissal of prior appeal for failure to prosecute bars review of same issue on subsequent appeal).

Since the July 27 Order denied a motion “to vacate and renew” the October 26 Order, Herskowitz cannot possibly raise any issue on her appeal of the July 27 Order that she could not have raised on her appeal of the October 26 Order. That (as shown at pages 8-11 of the 7/23 Memo.) this appeal is from an unappealable denial of reargument makes this a more compelling case for dismissal than under *Rubeo* where the plaintiff concededly had a right to appeal a the Supreme Court’s decision granting reargument and adhering to its prior decision. Under *Rubeo*, *Combier*, and *Whiteman*, her appeal of the July 27 Order must be dismissed.

In sum, the July 27 Order was an unappealable denial of reargument. Under the circumstances of this case, the Receiver has presented an accounting showing that he has distributed the funds in his possession (aside from the fees and expenses awarded to him under the October 26 Order) pursuant to unappealed Orders of the Supreme Court. He has been allowed his discharge. The funds of North Jersey have been distributed and the twenty-years of

chaos generated by this litigation are for all intents and purposes over. The instant motion would breathe new life into this monstrosity by reinstating the frivolous appeal of an unappealable Order brought by a party who lacks standing to object, is a \$4 million judgment debtor to North Jersey, and who has been sanctioned and held in contempt by this Court and many others in the course of twenty years of litigation.²⁶ It must therefore be denied.

²⁶ See *Matter of Herskowitz v. Tompkins*, 184 A.D.2d 402, 585 N.Y.S.2d 386, 388 (1st Dept. 1992); see also *Windels Aff.* Ex. C at 2-7, Ex. D at 1-4, Ex. F at 6-7, Ex. H at 10-11.

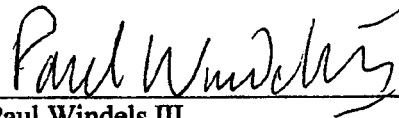
CONCLUSION

For the reasons set forth above and in the Receiver's Memorandum of Law dated July 23, 2008, the motion to vacate this Court's Order of September 2, 2008, should be denied, together with such other and further relief as the Court may deem just and proper.

Dated: Scarsdale, New York
October 21, 2008

Respectfully Submitted,

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