

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, ~~ROSENE HERSCOWITZ~~ :
~~XXXXXXXXXXXXXXXXXXXX~~ :
:
Defendants. :
:
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REPLY MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS 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 Reply Memorandum of Law in support of his motion to dismiss the appeal herein.

Appellant Judith Herskowitz does not and cannot contest the facts central to this motion:

- a. That the Supreme Court granted the Receiver's motion for approval of his accounting and to be discharged by final Order entered on October 26, 2006 (the "October 26 Order");¹
- b. That Herskowitz filed a Notice of Appeal of the October 26 Order but failed to perfect that appeal;²
- 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;³
- 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;⁴
- 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;⁵

¹ See Affirmation of Paul Windels III dated July 23, 2008 ("Windels Aff.") Ex. B. The October 26 Order is expressly marked as a "final" disposition on its cover sheet.

² 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.

³ *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.)

⁴ See Windels Aff. ¶¶ 10-14.

⁵ See Windels Aff. Ex. J at 2-3.

- g. That this appeal is taken from the July 27, 2007, Decision and Order of the Supreme Court (the “July 27 Order”) denying Herskowitz’s motion “to vacate and renew” the October 26 Order “in its entirety”;⁶
- h. That Herskowitz offered no facts in support of her motion to “renew and vacate” 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;⁷ and
- i. That, in denying her motion “in its entirety” the Supreme Court denied reargument of its prior, final October 26 Order.⁸

As set forth in the Receiver’s Memorandum of Law dated July 23, 2008, in support of this motion at 9-11, the denial of reargument is unappealable as a matter of black letter law, and the appeal of the July 27 Order must therefore be dismissed.

Being unable to contradict any of these points, 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 in fact appealed it to this Court.⁹ Moreover, the Supreme Court did accept her papers objecting to the Receiver’s accounting and heard oral argument from her on January 23, 2006. Indeed, the Supreme Court found in its March 23, 2006, Decision and Order (subsumed in

⁶ See Windels Aff. Ex. A.

⁷ See Windels Aff. Ex. A at 4-5.

⁸ See *id.*, at 5.

⁹ Her appeal of October 26 Order was dismissed by this Court on March 25, 2008.

See page 2, notes 2-3, *supra*.

the October 26 order)¹⁰ 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. The Court further overruled Herskowitz's objections on the merits in that same Decision.¹¹ 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.¹²

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.¹³ Had that decision been based on a default, Herskowitz would have borne the burden of proving below and to this Court that any default on her part was excusable under well settled law. *See e.g., Kanat v. Oscher*, 301 A.D.2d 456-57 (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

¹⁰ See Windels Aff. Ex. B at 2. Nowhere in her papers does Herskowitz acknowledge the existence of the March 23 Decision and Order

¹¹ See Windels Aff. Ex. J at 2-4.

¹² 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 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.

¹³ A copy of the table of contents of that brief is reproduced for the convenience of the Court as Exhibit K to the Windels July 23 Affirmation.

argument. *See* Windels Aff. Ex. K.¹⁴ Nor does the July 27 Order itself 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.¹⁵

Equally unavailing is Herskowitz's contention that, since the decisions cited by the Receiver dismissed appeals that had already been fully briefed and argued on appeal, this appeal cannot be dismissed by motion. That those decisions – and many more including this Court's prior holding in this case¹⁶ – dismissed appeals from denials of reargument and by their express terms did not review the merits demonstrates that this relief is available on motion. While Herskowitz argues that these cases were determined "in a plenary appeal on the appellate record" (Herskowitz Memorandum of Law, dated August 4, 2008, at 2), Herskowitz has filed her brief and appendix in this appeal and would be free to point to any part of that record to demonstrate that she relied on facts not previously available to her in support of her motion to

¹⁴ Nowhere does the July 27 Order address any issue of a default with respect to the October 26 Order. *See* Windels Aff. Ex. A.

¹⁵ 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.

¹⁶ *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dep't 1992).

renew. Yet neither her Memorandum of Law nor her Affidavit (sworn to August 4, 2008), raise a single new fact. To the contrary, as noted in the Receiver's July 23 Memorandum (at 10-11), the points argued in Herskowitz's Brief on appeal are all points that Herskowitz actually raised before in this litigation. No purpose would be advanced by requiring the Receiver to file a full brief and appendix¹⁷ simply in order to determine that Herskowitz did not raise any new facts in support of her purported renewal motion – especially where, as here, Herskowitz has not identified a single such fact.¹⁸

In sum, the July 27 Decision and 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. All that stands between him and that discharge is this 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.¹⁹ As a matter of law, as a matter of equity, and as a matter of justice, this appeal must be dismissed forthwith.

¹⁷ Herskowitz's Appendix omits many critical points of the record, including pertinent decisions of the Supreme Court below.

¹⁸ 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.

¹⁹ 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.

AFFIRMATION OF SERVICE

PAUL WINDELS III, an attorney duly admitted to practice before this Court, affirms, pursuant to CPLR Rule 2106:

1. I am a member of the Bar of this Court and am receiver of the assets of North Jersey Trading Corporation ("North Jersey"), pursuant to this Court's order of May 21, 1991.

2. On, June 15, 2006, I served true and correct copies of the annexed Notice of Entry upon defendant Judith Herskowitz, *pro se*, by depositing a copy in a securely sealed envelope with express mail postage prepaid thereon in an official depository of the United States Postal Service addressed to: JUDITH HERSKOWITZ, P.O. Box 403543, Miami Beach, Florida 33140, and upon plaintiff Susan Charney, *pro se*, defendants [redacted] and [redacted] Herskowitz, *pro se*, and upon the counsel for the Estate of Steven Delibert by depositing copies in securely sealed envelopes with first-class postage prepaid thereon, and addressed to SUSAN CHARNEY, 585 West End Avenue, New York, New York 10024, [redacted] HERSKOWITZ, 490 West End Avenue, New York, New York 10024, [redacted] HERSKOWITZ, P.O. Box 403543, Miami Beach, Florida 33140, and STEVEN MORRIS, ESQ., 277 Broadway, New York, New York 10007.

3. I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
June 15, 2006


PAUL WINDELS III

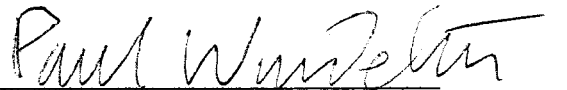
CONCLUSION

For the reasons set forth above and in the Receiver's Memorandum of Law dated July 23, 2008, the appeal herein should be dismissed, together with such other and further relief as the Court may deem just and proper.

Dated: Scarsdale, New York
August 9, 2008

Respectfully Submitted,

PAUL WINDELS III



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