

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 OPPOSITION  
TO WINDELS' MOTION TO DISMISS APPEAL**

Appellant Judith Herskowitz files her Memorandum of Law in Opposition to Windels' Motion to Dismiss Appeal. For the facts Appellant relies on her accompanying Affidavit.

Paul Windels III ("Windels") submits in support of his Motion to Dismiss what in effect is a mini brief however, without the required references to the record. Mr. Windels engages in a one sided "Statement of the Facts and Procedural History", to entice Herskowitz into a factual debate outside of the appellate record on his distorted version of the facts.

This appeal has been perfected for the October term and has been put on the court's calendar pursuant to §600.11 of the Rules of the Appellate Division First Department.

Herskowitz had already submitted her brief, and cannot now be made to entangle in the

detailed unsupported nuances engaged in by Windels in his motion papers. This has been the history of this case, to deem matters to be a reargument that were not considered on the record and evidence in the first place. Thereby, the legal concept of reargument has been misused as a shield and a sword, so that the substantive issues of the facts and controlling principles of law raised by Herskowitz would not be considered at all.

Windels mischaracterizes the July 27, 2007 decision and order of the lower court as having denied Herskowitz's "motion to reargue the Supreme Court's October 26, 2006 Order approving the Receiver's accounting and discharging him". Windels relies upon several authorities for the proposition that the Court's denial of reargument of its October 26, 2006 order mandates dismissal of this appeal. *Morris Heights Health Center, Inc., v. DellaPietra*, 38 A.D.3d 261; 834 N.Y.S.2d 9; (1<sup>st</sup> Dept. 2007); *Phoebe Johnson v. Ford*, 33 A.D.3d 529; 823 N.Y.S.2d 67; (1<sup>st</sup> Dept. 2006); and that Herskowitz's motion cannot be characterized as a motion for renewal citing *Garner v. Latimer*, 306 A.D.2d 209; 761 N.Y.S.2d 657; 1<sup>st</sup> Dept. 2003) and *Cuccia v. City of New York* 306 A.D.2d 2; 761 N.Y.S.2d 31; (1<sup>st</sup> Dept. 2003). What Windels fails to mention is what is common to all these cases is that they were not decided on a motion, but in a plenary appeal on the appellate record. None of these cases allow for the elimination of plenary review by motion.

Contrary to Windels' contention the instant July 27, 2007 order refers to Herskowitz's motion as one to "renew and to vacate the Receiver's account on various grounds". As noted in Herskowitz's accompanying affidavit, although the October 23, 2006 order is a

final order it is not appealable inasmuch as it granted Windels' motion for approval of his accounting by defaulting Herskowitz, for "having failed to appear before the Court on September 11, 2006 in support of her objections". It is provided under CPLR §5511 that

"An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party."

Also 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) No appeal lies from order granted upon default, but only from the order denying the motion to vacate the default. Since Herskowitz had not appeared there was nothing to reargue from the October 23, 2006 order and the remedy was by motion to vacate that order. So, the appeal is properly pursued from the July 27, 2007 order denying the motion to vacate.

Moreover, to settle and approve receiver's account an evidentiary hearing is required under Business Corporation Law §1216 (c) upon presentation of receiver's account to hear the allegations, objections and proofs, of interested parties upon which to allow or disallow his account and make a final order. No such evidentiary hearing was set. Windels simply presented his account on September 11, 2006 and Herskowitz was defaulted for not appearing so that Windels accounting was summarily approved without a settlement on objections and proof, simply by foreclosing Herskowitz from being heard on her objections. Therefore no issues were decided that could be deemed a reargument.

An order granted upon default of the non-appearing party is not appealable, on the additional ground, that appellate review is limited to matters that were contested in the Supreme Court. *Katz v. Katz*, 68 A.D.2d 536, 418 N.Y.S.2d 99 (2<sup>nd</sup> Dept. 1979) and *James v. Powell*, 19 N.Y.2d 249; 279 N.Y.S.2d 10; 225 N.E.2d 741 (1967) Appeal from the affirmance of the order striking defendants' answers was dismissed, because it was entered upon default for non-appearance of defendant, whereby the matter was not contested, and so there was no determination of the action within the meaning of the Constitution. Since the instant October 23, 2006 order was not entered upon proceedings contested by Herskowitz, on that further ground the July 27, 2006 order was not a reargument of that prior order, or of any prior order since Mr. Windels' activities could not be contested by Herskowitz on the merits based upon the record and evidence at any prior time.

In the April 13, 2004 order allowing the May 29, 2003 motion for disbursement of the North Jersey surplus, Windels' authority to disburse was conditioned upon filing a final accounting in compliance with Business Corporation Law §§1216 and 1217 as expressly directed by the lower court. However, Mr. Windels had not engaged in any publication of notices when that order was entered, to authorize him to proceed with that distribution as the so called "Receiver of the Assets of North Jersey Trading Corporation. It is Hornbook Law that a final order is

"One which terminates the litigation between the parties and the merits of the case and leaves nothing to be done, but to enforce by execution what has been determined."Black's Law Dictionary Fifth Edition.

Since the judicial work was not completed upon entry of the April 13, 2004 order there was no finality to that order. In fact Windels has not presented his accounting for more than two years later until September 11, 2006 and the final order was not issued until October 23, 2006 and was entered on October 26, 2006. On this point even Mr. Windels concurs.

Furthermore, that July 27, 2007 order did modify the October 23, 2006 order, in response to Herskowitz's motion to renew and to vacate, from having defaulted Herskowitz for non-appearance to denying her standing that she is not an interested party to object to Windels' accounting.

The October 23, 2006 order was further modified which had approved Windels' accounting as "Paul Windels III, who was appointed Receiver of defendant North Jersey Trading Corporation by Order of this Court dated May 21, 1991". Upon protests of Herskowitz that there is no such appointment in that May 21, 1991 order and there is no provision under Business Corporation Law Article 12, for a receiver of the corporation, that July 27, 2007 referred to Windels as the "appointed Receiver of the property of North Jersey Trading Corporation.

It is undisputed that Windels has not taken an oath and posted no bond under that May 21, 1991 order of appointment, but this was erroneously deemed to be moot in that July 27, 2007 order, because Herskowitz had not lodged such objection at the time Windels was appointed Receiver. Mr. Windels concedes on page 3 of his Memorandum that he

“was prevented from acting as Receiver on account of the prior appointment of another receiver” and by appointment of a bankruptcy trustee of the same North Jersey assets. So, there was no occasion for Herskowitz to object at the time of that 1991 appointment, that never took effect.

Mr. Windels would further claim that his appointment was continued by a November 24, 1995 order. What Mr. Windels would seek to escape among others by the dismissal of this appeal is Charney’s motion by Order to Show Cause dated September 28, 1995 upon which that November 24, 1995 order was entered, which clearly shows that Mr. Windels sought appointment only as a post-judgment receiver under CPLR §§5105, 5228 and 6401 and not under any provision of Business Corporation Law. §§1202 or 1203 to serve as “Receiver of the Assets of North Jersey”. (Herskowitz’s Appendix A-168-169). He could not, because there was no corporate property within the State of New York. All that was sought in Charney’s motion was a custodian of the funds that would remain from the New Jersey Bankruptcy Court proceedings “for distribution to the shareholders”. (A-176 ¶7) Herskowitz is a majority shareholder of North Jersey and so she is very much an interested party.

The modification of the October 23, 2006 order by ruling that Herskowitz lacks standing to raise objections and by redefining the status of receiver in the July 27, 2007 had the effect of treating Herskowitz’ motion to renew as having raised new grounds and thereby created a newly appealable order.

**CONCLUSION**

For the reasons set forth above, Windels' Motion to Dismiss Appeal should be denied.

Dated: Miami Beach, Fl.  
August 4, 2008

Respectfully submitted,

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By : \_\_\_\_\_  
JUDITH HERSKOWITZ

As noted in Mr. Windels Memorandum Charney's Motion for an Order directing distribution of the funds by Order to Show Cause dated May 29, 2003, was set only "for oral argument" upon which the April 13, 2004 order was entered. So no evidentiary hearing defaulting Herskowitz was . So that no evidentiary hearing was ever set to hear objections and to take proof on that distribution, on unliquidated accounts for payment of fees.