

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff - Respondent

-against-

Index No. 24517/88
I.A.S. Part 30
Justice Sherry Klein Heitler

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ

PREARGUMENT STATEMENT
PURSUANT TO 22 NYCRR §600.17

Defendants - Appellants.

1. The title of this proceeding is as set forth in the caption above.
2. The full names of the original parties are as set forth in the caption above and there have been no changes in the parties except that Alexander Fried has deceased and [REDACTED] [REDACTED] are not participating.
3. Defendant - Appellant Judith Herskowitz is appearing pro se, P.O. Box 403543 Miami Beach, Florida, 33140, (305) 534-7600.
4. Plaintiff's counsel Steven Delibert deceased in July, 2004 and plaintiff Susan Charney is appearing pro se, 585 West End Avenue, New York, N.Y. 10024, (212) 799-7903.
5. This appeal is taken from the Supreme Court, New York County.
6. This is an appeal from a final order dated October 23, 2006, filed on October 26, 2006.
7. The nature and object of the proceedings below relate to a surplus funds of \$700,000.00 that remained from the sale of the real property of North Jersey Trading Corporation ("North Jersey") in a Chapter 11 bankruptcy proceeding in Trenton New Jersey. This was a surplus after payment of all claims and administrative expenses, free and clear of claims of creditors. Plaintiff Susan Charney with her New York counsel the late Steven Delibert and the Herskowitz

defendants participated in the bankruptcy proceedings. The bankruptcy judge expressly held that the surplus funds belonged to the shareholders. Judith Herskowitz is a majority shareholder of North Jersey. It was acknowledged that the distribution to shareholders was a function of the bankruptcy court. Although the within New York case had terminated, Mr. Delibert convinced the court to transfer the surplus funds to Mr. Paul Windels III, a New York attorney to hold it as “neutral custodian” for the sole purpose of distribution to shareholders in the Supreme Court of New York County.

8. These representations were made only to gain possession and control over the surplus funds, because immediately upon Mr. Windels’ receipt of those funds in August 2000, it was secreted for three years from Judith Herskowitz . It reappeared only upon her inquiries, but it was not for determination for distribution to shareholders. Mr. Delibert and plaintiff Charney had entered into a private out of court deal, without Herskowitz’s knowledge, to divide up the entire surplus funds as prearranged with Mr. Windels, and four other attorneys who never appeared in the instant New York case, three of whom were Florida attorneys beyond the jurisdiction of the New York court.

9. Mr. Windels then claimed to be the “Receiver of North Jersey Trading Corporation” under a May 21, 1991 order, purportedly under Article 12 New York Business Corporation Law. The foregoing without regard that Mr. Windels was not appointed “Receiver of North Jersey Trading Corporation” under that May 21st order; that Mr. Windels never qualified and never served as any kind of receiver under that order; that no appointment of a general receiver is provided under Article 12, B.C.L. and there is no general receiver under New York law for a foreign corporation such as North Jersey.

10. It was only after Mr. Windels paid out the surplus funds as was prearranged that he purported to designate the recipients of those funds as creditors, although they had never made the required claim in the New York case. This designation of creditors appeared for the first time in Mr. Windels' Motion for Approval of Final Account of Receiver he filed on September 30, 2005. Mr. Windels purported to rely on §1216 B.C.L. in his motion which under §1216(c) B.C.L. requires that "upon presentation of such account, the court shall hear the allegations, objections and proofs of all parties interested". None of these requirements were met by the court below.

11. Initially the court set Mr. Windels' motion for hearing for January 23, 2006 at which time Herskowitz appeared from Florida. Following that an order dated March 23, 2006 was entered that summarily rejected Herskowitz's papers in opposition to Windels' motion without holding the required evidentiary hearing, and barred her from appearing to object by depriving her of standing, on the unsupported ground that she owed North Jersey \$4 million on a turnover order, disregarding that no such turnover order exists. Mr. Windels' motion was then reset for September 11, 2006 and his papers were accepted ex parte without any hearing and proofs, with none of the alleged creditors appearing. Nevertheless, the illusion was created in the instant October 23, 2006 order that Herskowitz by not appearing before the court on September 11, 2006 forfeited her opportunity to be heard when in fact she was already barred by the prior March 23, 2006 order from appearing to be heard on her objections.

12. No result was reached by a decision of the court below. That October 23, 2006 order was prepared and was submitted by Mr. Windels purportedly pursuant to Rule 202.48 of the Uniform Rules for the Trial Courts of New York State. However, it was without the required

decision, signed and filed by the court directing to settle and submit an order. The Court signed the order verbatim as was prepared by Mr. Windels except for omitting that the September 11, 2006 hearing was for “oral argument”. Since admittedly no evidence and no testimony was intended to be taken on Mr. Windels’ accounting, and it is the court that is to “make a final order”, but that function was delegated to Mr. Windels, that October 23, 2006 order fails to meet requirements of §1216(c) B.C.L.

13. Accordingly, the surplus funds were disposed without any judicial determination as prearranged in that private out of court deal as supposed fees on a purported \$4 million judgment procured by plaintiff on behalf of North Jersey by default against Judith, [REDACTED] Herskowitz (“the Herskowitzes”). Omitted is the fact that this judgment was extinguished by the full satisfaction of that judgment, including the fees in a settlement in the bankruptcy court sometime in 1999, which discharged that judgment against all the jointly liable Herskowitzes. However, Justice Heitler failed and refused to mark that satisfaction into evidence and totally disregarded it from all her orders.

14. That October 23, 2006 final order as well as the prior orders were entered without creating any record, upon which to pursue an appeal, unconscionably limiting Herskowitz to a review to the face of the instant order, solely as authored and on papers of Mr. Windels. Accordingly an evidentiary hearing is essential to be held in the trial court, preferably before another judge, before this appeal can proceed.

15. The denial of the statutorily required hearing is alone a ground for reversal, as is the lack of subject matter jurisdiction since there is no statutory provision for “Receiver of North Jersey”. A further ground is the lack of personal jurisdiction over the nonresident Judith

Herskowitz, that the default judgment is void on its face for lack of proof of service, the full satisfaction of the judgments and the lack of legal basis for disbursing the entire corporate surplus, particularly to the Florida attorneys, beyond the territorial jurisdiction of the court.

Dated: December 11, 2006
Miami Beach, Florida

Respectfully submitted,

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By: Judith Herskowitz
JUDITH HERSKOWITZ