

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J.

SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
XXXX HERSKOWITZ and XXX HERSKOWITZ,

Defendants.

**REPLY MEMORANDUM OF LAW
TO WINDELS' MEMORANDUM
IN OPPOSITION TO MOTION FOR
DISQUALIFICATION OF JUDGE**

Index No. 24517/88

JUDITH HERSKOWITZ, respectfully submits her Reply to the Memorandum of Law in Opposition to Motion for Disqualification of Judge of Paul Windels III ("Windels").

Mr. Windels concludes from the cases he submits, that the judge is not required to recuse herself because it is solely within court's discretion. However, the very cases he relies upon suggest otherwise.

Burdick v. Shearson American Express, Inc., 160 A.D.2d 642, 559 N.Y.S.2d 908 (1st Dept. 1990) leave to app. denied, 76 N.Y.2d 706, 560 N.Y.S. 2d 988 The objectionable personal observation was made by the court to the respective attorneys, that is both sides were present, whereas at issue here are orders being entered by the court, based on extrajudicial prearranged predeterminations in which only plaintiff's attorney and Mr. Windels participated, while barring Herskowitz, so as to proceed ex parte. Interestingly, the issue in *Burdick* was "fair trial" where no trial and not even an evidentiary hearing was accorded by this Court to Herskowitz despite repeated requests.

In *Conti v. Citrin*, 239 A.D.2d 251, 657 N.Y.S.2d 678 (1st Dept. 1997) it is noteworthy

that the court set it down for an evidentiary hearing on the award of attorney fees in postjudgment proceedings, which alone shows the bias and prejudice of the Judge in this case, because she never scheduled for an evidentiary hearing the close to \$700,000.00 of fees to plaintiff and her attorneys, obviously not to take evidence and testimony, because it was predetermined as prearranged and was intended to be a summary proceeding by eliminating Herskowitz.

In *People v. Grief*, 273 A.D.2d 403, 709 N.Y.S.2d 607 (2d Dept. 2000) the question was the appearance of partiality, and where the judge expressed that “she did not ‘have an initial position on this case’ and was ‘trying to be as fair as possible to both sides’ which was never said in this case, but to the contrary Herskowitz was subjected to orders replete with personal ad hominem attacks, to avoid ruling on the merits which alone should require “recusal as a matter of due process”. In the case at bar, the court has taken a position decided in foregone conclusion, even before Herskowitz ever appeared before this Judge, to approve and uphold the predetermined plan for the appropriation of the surplus funds of close to \$700,000.00. That is pursued with a strategy to harass Herskowitz in a pattern of tactical maneuvers to eliminate her, because “she is the only one objecting”.

The record is replete with “actual ruling which demonstrate bias” for disqualification noted in *Conti* supra. In fact the orders of this Court are not ones based on the law and the facts, but to defend and maintain the appropriation of that close to \$700,000.00 surplus of North Jersey Trading Corporation (“North Jersey”) for which this Court has aligned itself with Windels. Just the latest of such order is the one dated March 23, 2006 entered for the purpose to eliminate Herskowitz a majority shareholder in advance of the hearing on Windels’ Motion for Approval of Accounting of Receiver by denying her standing on the accusation that she owes \$4 million

on a turnover order of September 18, 1992. However, this has been shown not to be the case in Herskowitz's Motion for Disqualification of Judge, which Windels has not and was not able to rebut.

There are a number of orders in this case, that while orders were entered on motions on other matters had orders included on matters without notice, motion and hearing, so that they were entered ex parte. Among these the September 18, 1992 order which without the required consolidation under CPLR § 602 in an order entered in the above entitled case included without notice and hearing an unrelated turnover order under Index No. 12002/92 on a \$5,000.00 money judgment. Yet another one is a December 1990 order in which also without notice and hearing included was an alleged denial of Herskowitz's motion to dismiss for lack of personal jurisdiction in a May 8, 1990 order, which never happened. Yet another order is a November 1995 order which makes reference to powers of permanent receiver of a temporary receiver under N.Y. B.C.L. also without notice, motion and hearing, and entered by default.

Regardless of the flagrant denial of due process, the undue advantage and intentional harm and prejudice to Herskowitz, a nonresident appearing pro se for lack of funds, and that these orders are unappealable because of the requirement that a motion be made to vacate them in the lower court, Justice Heitler does not allow Herskowitz to file these motions.

In his opposition paper to this motion Windels still continues to misrepresent that he is "Receiver pursuant to Order of this Court dated May 21, 1991". However, this was for a temporary receiver of the property of North Jersey, for which it is undisputed he never qualified never served and was never reappointed as permanent receiver by the final judgments. B.C.L. §1203 makes clear that a temporary receiver is appointed before final judgment or final order in an action. The appointment of receiver of a foreign corporation is an rem jurisdiction. The only

provision that applies to an action on a foreign corporation such as North Jersey, a New Jersey corporation, is B.C.L. 1202(a)(4) expressly stating that it is “an action for the preservation of assets in this state”. Under special provision B.C.L. §1218 (a)(6) applicable to foreign corporations upon conclusion of the case by trial or upon default, if the court makes the finding that the corporation

“has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, nationalized, or its authority or existence has been otherwise terminated or cancelled, the court shall thereupon **direct judgment, appointing a permanent receiver and directing the receiver to liquidate the assets**, credits, choses in action and property, tangible and intangible **in the state of New York** of the said defendant, in the manner provided in this article.” (Emphasis supplied)

Windels could never be appointed permanent receiver because a permanent receiver under B.C.L. §1206(a) “upon qualifying under section 1204 (Oath and security) shall be vested with title to all the property of the corporation” nor could he liquidate the North Jersey property, because prior to the New York final judgments, North Jersey filed in March 1993, a voluntary petition for relief under Chapter 11 in the New Jersey bankruptcy court and the title to the property vested in the bankruptcy trustee, who then liquidated it upon order dated August 3, 1994 in a bankruptcy court cash sale to Tomer Realty for which she issued a trustee’s deed dated September 9, 1994 (See Exhibits 3 and 4 to Reply Affidavit).

That November 1995 post-judgment order made on a September 28, 1995 motion by Order to Show Cause (Exhibit 9 to initial Affidavit) was solely on the ground of “CPLR, 5106, 5228 and 6401” for appointment of a post-judgment receiver to collect on that \$4.3 million judgment against the property of the judgment debtor, with no mention of Article 12 Business Corporation Law, to have “renewed Windels’ appointment as Receiver”, for anything else than as

a post-judgment receiver for collection on that \$4million judgment. That 1995 order could not go beyond the ground relied upon in that motion, particularly where it was entered by default. *Jenkins v. Warren*, 25 App. Div. 569, 50 N.Y.S. 957 (1st Dept. 1898). Nor can that 1995 order give powers beyond the statutory provisions of §§ 5106, 5228 and 6401, *Board of Education v. Woolsey*, 254 App. Div. 621, 3 N.Y.S.2d 93 (3rd Dept. 1938).

This Court is fully aware that the appointment of receiver is governed by strict publication requirements, B.C.L. 1207(a)(1) requires to give “immediate notice of his appointment” with notice to creditors to present their claim, and B.C.L §1207(a)(2) requires the receiver to call a general meeting of the creditors of the corporation within four months from the date of his appointment. All of this Windels attempted to do at the end of 2004, or 13 years after a May 21, 1991 order. The absence of these statutory and procedural requirements alone evidence that Windels is not a corporate receiver. Regretfully, this Court is so adamant to let stand that extrajudicially predetermined appropriation of the surplus of close to \$700,000.00 (noted in detail on page 3, ¶6 of the Affidavit for Disqualification), and to deprive Herskowitz of her right to those funds, that it would construe these fatal defects, merely as omission and defaults, to be cured by yet another biased and prejudicial order of this Court.

Dated: Miami Beach, Fl
June 29, 2006

Respectfully submitted,

JUDITH HERSKOWITZ J.D
Defendant Pro-se
P.O. Box 403543
Miami Beach, Fl. 33140
Tel: (305) 534-7600