

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
XXXXHERSKOWITZ and XXXHERSKOWITZ,

Defendants.

IAS Part 30 Heitler J.

**REPLY AFFIDAVIT TO
AFFIRMATION IN OPPOSITION
TO MOTION FOR
DISQUALIFICATION OF JUDGE**

Index No. 24517

STATE OF FLORIDA)
) S.:
MIAMI-DADE COUNTY)

JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. I make this affidavit on personal knowledge, without submitting to the personal jurisdiction of this Court, in Reply to Affirmation in Opposition to Motion For Disqualification of Justice Sherry Klein Heitler from this case.

2. The Affirmation by Pul Windels III (“Windels”) in opposition to Motion For Disqualification of Justice Heitler contains only two factual assertions that are related to the instant Motion to Disqualify. These consist of Windels’ statement in paragraph(1) to he is the “receiver of the assets of North Jersey Trading Corporation (“North Jersey”), pursuant to this Court’s order of May 21, 1991), and his contention in paragraph (2) that he “at no time conspired to defraud the United States Bankruptcy Court for the District of New Jersey or anyone else for that matter”.

3. As demonstrated herein, these assertions are false. One of several grounds evidencing their falsity is that Windels makes no attempt to refute his knowledge, or custody of the full satisfactions of judgment for each judgment entered in relation to Index No. 23002/92 and Index

No. 24517/88, to which Susan Charney, her deceased attorney Steven Delibert himself, the Bankruptcy Trustee and others were parties, nor does he deny the fact that both he and Delibert had actively colluded to conceal the existence of the full satisfactions of these judgments from Judith Herskowitz. (See Herskowitz Affidavit ¶13).

4. But the more pertinent fact that goes unrefuted is that Herskowitz had, by the time of the hearing on June 21, 2004, obtained genuine copies of these satisfactions of judgment, whose authenticity was acknowledged by both Windels and Delibert and as such these satisfactions were presented and accepted by Justice Heitler at that hearing on Herskowitz's Motion to vacate the order of distribution entered on April 13, 2004 by default, that approved the distribution of close to \$700,000.00 in Chapter 11 surplus funds (Herskowitz Affidavit ¶ 16).

5. Justice Heitler stated in no uncertain terms at that hearing that she was well versed on New York law regarding the legal effect of these full satisfactions of judgment in extinguishing orders and judgments entered herein and also would have known that her order granting distribution of the \$700,000 had to be vacated as a matter of law pursuant to CPLR § 5015(a)(4) for lack of subject matter jurisdiction.

6. For the same reasons, Justice Heitler would have known at bare minimum, that the contempt and commitment orders that had been entered against Judith Herskowitz in this case as well as under Index No. 23002/92 had been without further force and effect following execution of those satisfactions of judgment in 1999, well before the issuance of the Order to Show Cause for distribution of the surplus Chapter 11 funds, dated May 29, 2003 in this cause.

7. In addition, Justice Heitler would have known that for a period of nearly three years, from August 9, 2000, when the Chapter 11 case was dismissed, and the surplus funds were

transferred to the custody of Windels, to the date of the hearing of June 21, 2004 Windels and Delibert continued to perpetuate the fraud that Judith Herskowitz was subject to contempt and commitment orders and that she would be subject to arrest under authority of the court should she attempt to appear for hearings without obtaining some form of relief from those orders. Moreover, that the temporary suspension of these arrest orders served actually to reinforce the fraud Windels and Delibert had been perpetuating and to threaten Herskowitz with the continued enforcement of these arrest warrants,

8. Thus, Justice Heitler must have known that she lacked jurisdiction under BCL §626(e) to distribute the surplus Chapter 11 funds and that Windels and Delibert were using invalid and illegal contempt and commitment orders to oppress and prejudice the rights of Herskowitz to her entitlement to the North Jersey surplus Chapter 11 funds as a majority shareholder. Justice Heitler treated these satisfactions of judgment as if they had no meaning or effect and likewise disregarded the fatal defects of Charney's judgments and orders. Thus, paving the way for Windels Delibert, Charney and their associates to defraud Herskowitz of her entitlement to these surplus funds, so that they could appropriate these funds through their illegal distribution scheme as fully described in their May 29, 2004 motion for disbursement of the North Jersey funds.

9. As to a background information, under that May 21, 1991 order appointing Windels as temporary receiver of the North Jersey real property a 54 unit apartment building at 200 Riverside Drive NYC , Windels has never qualified and so he has never taken an oath or posted a bond and has never taken possession and control over that property. That is because Charney's lawsuit impaired the refinancing of the real property by conventional means upon its mortgage having ballooned and it was driven into foreclosure and the mortgagee had his own receiver

appointed. In attempts to save the property, North Jersey a New Jersey corporation petitioned for voluntary Chapter 11 bankruptcy in the U.S Bankruptcy Court for New Jersey.

10. Charney opposed North Jersey's plan of reorganization and joined with Trustee for the sale of the real property, resulting in an order dated August 31, 1994 authorizing that sale. Following that sale a deed was executed by Trustee transferring all right and title to the purchaser.

11. In a motion dated September 28, 1995 Charney sought in this Court pursuant to CPLR 5106, 5228 and 6401 to modify the May 21, 1991 order

“by expressly authorizing the Temporary Receiver appointed therein to continue in office notwithstanding the entry of judgment, to take control of certain property of the corporation and to assist in the enforcement of certain property of the corporation.”

Thereupon an order dated November 20, 1995 was entered which included a provision,

“that all of the said powers of the said receiver shall be subject to and subordinate to such orders as may issue from the United States Bankruptcy Court for the District of New Jersey.”

12. In his Affirmation dated August 2, 1996 filed in the New Jersey Bankruptcy court Windels in support of a motion for abstention and for an order directing Trustee to complete the administration, and to pay over all surplus funds to the receiver of North Jersey Trading Corporation Windels' included an oath he had executed on January 4, "1996" based on that November 20, 1995 order of appointment. Windels stated that it was for benefit of Susan Charney, with no oath taken for the benefit of North Jersey, while he claimed that he was the receiver for the property of North Jersey, at 200 Riverside Drive NYC, which as stated above was already sold in 1994.

13. During the pendency of the North Jersey bankruptcy Charney's attorney Steven Delibert made several applications for fees and expenses, pursuant to 11 U.S.C. §503(b)(4) as an administrative expense for professional services rendered. In these applications Charney acknowledged that attorney's fees could be awarded only if Charney,

“realized any actual recovery on behalf of debtor with respect to the derivative action judgments”.

Delibert made three applications the first of which was dated March 20, 1995, that awarded attorney Delibert administrative claims of \$19,692.20 for counsel fees and \$3,096.95 for expenses. A second application was granted by order dated September 11, 1995, for \$24,310.00 in fees and \$2,862.72 for expenses.

14. A third application, however, was denied by the Bankruptcy Court stating in a letter opinion of May 2, 1997, that no additional allowances were justified upon the standard determining “substantial contribution”. In this same letter opinion, the Bankruptcy Court noted that the litigation in Florida over the validity of Charney's New York judgments “appear to be primarily for [Charney's] benefit rather than for the benefit of the estate”. Saying as follows:

“This is the Court's response to your motion for allowance of fees and expenses under Code section 503(b)(3)(D), authorizes the court to allow compensation and reimbursement of expenses to an attorney for a creditor or equity security holder in a chapter 11 case where such professional makes a “substantial contribution” to the case. You haven't submitted a memo on the standards for determining “substantial contribution” in this Court, which you should have. The mere fact that such allowances have been made by this Court before does not mean that they will continue to be made indefinitely.

Moreover, you note that one of the motions for which you seek such compensation was denied by this Court. It is difficult to understand how that could constitute a substantial contribution within the meaning of the subject standard. In addition, your client's challenges to the actions taken by the Herskowitzes in Florida to invalidate the New York judgments **appear to be**

primarily for your client's benefit rather than for the benefit of the estate."
(Emphasis supplied)

15. Earlier, at a hearing on August 3, 1994, regarding additional relief from the automatic stay, so Charney could seek to domesticate her New York judgments in Florida, Charney was informed that she would be proceeding at her own risk and expense and that her attorneys could not be compensated for their efforts to domesticate her New York judgments unless they "succeeded in receiving something there for the benefit of the estate" and furthermore that

"Mr. Delibert hasn't sought leave to be retained by Ms. Bezner. And therefore, it appears to me that if, and **only if, he and his client succeed in recovering something there, for the benefit of the estate**, and if and only if they make an application under code section 503B(3) and B(4), for rendering a substantial contribution to the case. Would they arguably have a basis for being compensated by the estate, for their services. **So essentially, they're proceeding at their own cost and their own risk**" (Emphasis supplied)

16. On April 19, 1999 the Bankruptcy Court entered an order approving the settlement agreement between Susan Charney individually and on behalf of North Jersey Trading Corp., and by Steven Delibert, Esq., to the extent that he has or may have any claims and/or rights of judgments against any of the settling Herskowitzes, by Karen Bezner, Esq., the Chapter 11 Trustee of North Jersey Trading Corp., Paul Windels III, Esq., Receiver of North Jersey Trading Corp., and XXXXand XXX Herskowitz etc., whereby the settling Herskowitzes paid a settlement sum of \$150,000.00 to the Chapter 11 Trustee, for which they were issued full satisfactions of judgment executed by all the above named parties.

17. Thereupon, an order dated August 9, 2000 was entered concluding the administration of the estate and trustee was directed to deliver "all estate funds in her possession" to Windels "as Receiver for North Jersey Trading Corp." that was free and clear of all liens and of upon all

administrative expenses having been paid. In her response dated December 10, 1999, Charney in support of the transfer to Windels asserted through Delibert that it was essential to resolve matters in the New York court because

“...there remain bitterly contested issues between Susan Charney and Judith Herskowitz as to who is entitled to the surplus remaining on behalf of the debtor”.

18. It was these representations that the Chapter 11 surplus was transferred to this Court’s jurisdiction of which Windels was fully aware. Noted on page 5, in a Memorandum Opinion of July 10, 2000 attached to Charney’s May 2003 motion seeking distribution of the funds was that

“After payment of all debts and administrative expenses to date the trustee has approximately \$700,000 left in the estate. This finally belongs to the debtor’s shareholders.....The trustee now proposes to dismiss the bankruptcy case and transfer the remaining funds to the New York receiver for adjudication of the shareholders rights therein.”

19. At all times Charney’s derivative judgments on behalf of North Jersey had been reported by the Trustee in her monthly reports as an account receivable. Concluded in that Memorandum Opinion was that

“All creditors have been paid in full and all costs of administration incurred as of the most recent applications have been paid”

Windels and Delibert were aware of these facts then they combined and conspired among themselves and with Charney’s Florida attorneys to enter into the unauthorized fee splitting agreement that was reflected in the affirmations and affidavits in support of Charney’s motion for distribution of assets.

20. This conspiratorial fee splitting arrangement then was presented to Justice Heitler under pretense of BCL 626(e), leaving North Jersey as an empty shell as noted below:

Attorneys	Charges Out-	Amount Agreed
	standing	
Susan Charney (partial reimbursement of sums already paid)	\$120,000.00	\$110,000.00
Steven Delibert, Esq.	\$767,904.74	\$401,950.94
Eric C. Christu, Esq.	\$102,879.45	\$105,000.00
William T. Livingston, III, Esq.	\$28,185.83	\$18,000.00
Clifford Hark, Esq.	\$44,541.12	\$25,000.00
Carlton, Fields, Ward, Emmanuel, Smith & Cutler	\$28,553.56	\$2,500.00
Paul Windels, III, Esq., Receiver	\$19,774.95	\$19,774.95
Totals	\$1,111,839.65	\$682,225.89

This scheme to appropriate the Chapter 11 surplus funds of North Jersey was thus in violation of the Bankruptcy court orders and laws 18 U.S.C §§ 153, 155 and 157 likewise of the laws and rules of the State of New York with regard to satisfaction of judgments and duties of receiver also mandating to distribute surplus funds to the shareholders, to which Windels and Delibert secured the approval of Justice Heitler.

JUDITH HERSKOWITZ

SWORN to before me
this 20th day of October, 2004

Notary Public - State of Florida