

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ.

-----X
Defendants.

SHERRY KLEIN HEITLER, J.:

Index No. 024517/88

DECISION & ORDER

FILED
MAR 31 2006
NEW YORK
COUNTY CLERK'S OFFICE

By decision and order dated April 13, 2004, this court held defendant Judith Herskowitz ("Herskowitz") in default and approved plaintiff's proposed plan for the disbursement of funds held by Receiver Paul Windels III ("Windels"), to creditors of North Jersey Trading Corporation ("North Jersey"), *i.e.*, to various counsel who prosecuted this shareholder's derivative suit on behalf of North Jersey. Therefore, this court ordered Windels to so disburse the funds. Thereafter, by decision and order dated October 12, 2004, this court denied Herskowitz's motion to vacate the default judgment of April 13, 2004. Subsequently, by decision and order dated June 8, 2005, this court again denied a motion by Herskowitz to vacate the default judgment of April 13, 2004, and directed Windels to move for judicial settlement of his final accounting as Receiver, pursuant to New York Business Corporation Law §§ 1216 and 1217. Additionally, the decision and order of June 8, 2005 enjoined Herskowitz "from submitting any future filings in this matter, which includes cases filed under index number 024517/88 and 0023002/92, without the prior written approval of this court." In decisions dated, respectively, October 21, 2005 and November 9, 2005, this court further clarified its injunction of June 8, 2005, elucidating that the injunction did not preclude Herskowitz from either filing papers responsive to motions brought by other parties in the case, or from taking an appeal from any of this court's orders.

Windels now moves for approval of his final accounting for funds held as Receiver, and for discharge as Receiver upon making final payment of the funds remaining in his possession.

Herskowitz opposes the motion, and cross-moves to vacate and set aside this court's decisions and orders of April 13, 2004 and October 12, 2004.¹

At the outset, it should be noted that Windels was appointed Receiver for North Jersey pursuant to an order of this court dated May 21, 1991 (Harold Tompkins, J.), which order was affirmed by the Appellate Division. See Charney v. North Jersey Trading Corp., 184 A.D.2d 409 (1st Dept. 1992). It should also be noted that Windels subsequently published notice of his appointment, called a meeting of the creditors of the corporation, and took an oath as Receiver and filed a bond in accordance with §§ 1204 and 1207 of the New York Business Corporation Law.² Additionally, Windels has submitted a verified accounting of the funds dispersed under this court's order dated April 13, 2004, in accordance with B.C.L. § 1215. Pursuant to B.C.L. § 1217, Windels seeks commissions on the sums received and disbursed, and provides the court with a calculation of those commissions which comports with that statute's requirements.

Herskowitz, alone, objects to Windels' submission of this final accounting as Receiver for North Jersey, and his request for commissions pursuant to B.C.L. § 1217.

Herskowitz, however, has no standing to lodge an objection to this accounting. B.C.L. § 1216(c) provides that, upon submission of a final accounting by a receiver, the court "shall hear the allegations, objections and proofs of **all parties interested** and allow or disallow such account, in whole or in part, and make a final order." While Herskowitz, no doubt, would assert an

¹ The court notes that Herskowitz has not requested the court's permission to file this cross-motion. Nevertheless, the court will address Herskowitz's cross-motion in the hope of laying these issues to rest, once and for all.

² Windels has provided the court with a copy of the bond and his sworn oath as Receiver.

“interest” in the resolution of this final accounting, the court is of the opinion that the meaning of “interested,” in this context, is defined by subdivision (a) of B.C.L. § 1216, which imbues “the attorney-general or any creditor or shareholder” with the standing to “apply for an order that the receiver show cause why an accounting and distribution should not be had,” where the receiver has not done so within one year of qualifying as receiver. Plainly, Herskowitz is neither a creditor or shareholder. To the contrary, Herskowitz owes in excess of \$ 4 million to North Jersey, as there has been a judicial determination that Herskowitz must turn over her shares in North Jersey to the Sheriff of New York County. See Matter of Herskowitz v. Tompkins, Index No. 12002/92 (S.Ct. N.Y.Cty. Sept. 18, 1992) (Tompkins, J.). To date, Herskowitz has not complied with this order, and there are, at present, arrest warrants outstanding, based upon her failure to so comply. See Charney v. North Jersey Trading Corp., Index No. 24517/88 (S.Ct. N.Y. Co. Feb. 19, 1993) (Tompkins, J.).³

Herskowitz’s objection, that Windels did not file an oath and bond following his appointment as Receiver in May 1991, is moot, as the court renewed Windels’ appointment as Receiver in November of 1995 and thereafter, in January of 1996, Windels filed said oath and bond. As noted in Schedule 1 of Windels’ attached accounting, Windels received no property on behalf of North Jersey until September 2000, due to Herskowitz’s filing of an intervening bankruptcy action that was ultimately dismissed. Notably, in that bankruptcy proceeding, as well as a separate order which settled the claims against defendants: _____, the bankruptcy court explicitly recognized Windels as the Receiver for North Jersey, and ultimately transferred the money received on behalf of North Jersey (for the sale of the corporation’s

³ For this reason, on each occasion Herskowitz has appeared before the court on this matter, this court has suspended the arrests warrants for a period of time sufficient to facilitate Herskowitz’s appearance.

of the receipt thereof; and it is further

ORDERED that, in accordance with B.C.L. §§ 1215 and 1216, the Receiver shall give no less than eight days' notice to the sureties on the bond, and notice to all persons interested in the property of the corporation, of the filing of this final accounting and request for commissions and for permission to resign, and shall do so by publishing such notice once a week for six successive weeks in at least two newspapers of general circulation in New York, setting forth 9:30 a.m. on June 26, 2006, at Room 438, 60 Centre Street, New York, New York 10007 as the date and location at which the Receiver and all interested parties are expected to appear, and the Receiver shall present this final accounting and the court shall hear any objections and concerns of such interested persons to show cause why the Receiver should not be permitted to resign; and it is further

ORDERED that the Receiver's motion for a final accounting, commissions and permission to resign is held in abeyance; and it is further


ORDERED that, as an Order of Commitment was entered on February 19, 1993, directing the Sheriff of the County of New York to Arrest Judith Herskowitz Herskowitz and Herskowitz, this court is lifting said Order and Warrant pursuant to a separate Order of today's date if Herskowitz chooses to appear on June 26, 2006 at Room 438, 60 Centre Street, New York, New York 10007; and it is further

ORDERED that Herskowitz's cross-motion is denied.

This shall constitute the decision and order of the court

DATED: March 23, 2006

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MAR 31 2006
NEW YORK
COUNTY CLERK'S OFFICE


SHERRY KLEIN HEITLER
J.S.C.