

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

IAS Part 30 Heitler J

Index No. 24517/88

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
CLARIFICATION TO RENEW AND TO VACATE THE MARCH 23, 2006 ORDER**

JUDITH HERSKOWITZ submits this Memorandum of Law in support of her Motion for Clarification, to Renew and Vacate and the March 23, 2006 order pursuant to New York CPLR § 2221(a) and §5015. For the facts Judith Herskowitz relies on her supporting Affidavit.

There are numerous issues here, that have never been heard and need to be decided supported with evidence and not on mere speculation and innuendos. Issues that have been raised for the first time in this Court's March 23, 2006 order and in Mr. Windels' Motion for Approval of Accounting of Receiver. It is obvious that this Court had to agree that something was amiss with the status of Mr. Windels as Receiver. Thereupon, Mr Windels embarked in publications with a retroactive effect and this Court likewise directed him to engage in publications. Upon reviewing this Memorandum this Court must realize that no amount of publication will give Mr. Windels legal status as receiver.

That is because of a missing basic element that cannot be rectified since it is jurisdictional, both in rem and subject matter, which can be raised at any time the absence of

North Jersey property within the state,. So there is no basis upon which to craft a receivership for Windels, and most certainly not upon that November 1995 order, when all the North Jersey assets were under control of a trustee in New Jersey. No relief is provided for that under §1213 B.C.L.

To enter an order ex parte on Windels' motion the Court deprived Herskowitz of standing in advance of the required evidentiary hearing pursuant to §1216(c) B.C.L. in flagrant violation of due process, on yet another unsupported allegation that there is a turnover order for all her corporate stocks for \$4 million that she owes to North Jersey, when in fact the Court knows that there is no such turnover order. How can the court enforce that alleged \$4 million debt when no motion was made by any of the interested parties to which Herskowitz could have responded. Why should Herskowitz have to travel from Florida to that September 11, 2006 hearing in New York in which she is not allowed to participate. When according to this Court's March 23, 2006 order only Herskowitz objects is she to be prop to the ex parte approval of Windel's accounting. This would be the fifth trip to New York (June 21, 2004, January 5, 2005, April 5, 2005 and January 23, 2006) at her own expense, when there is no order determining personal jurisdiction over her. The Court has likewise steadfastly refused to recognize the full satisfaction of the derivative default judgment of \$4 million so that it would not nullify that distribution of the surplus funds.

The March 23, 2006 Decision Is Void for Lack of In Rem Jurisdiction Because It Cannot Create A Receiver of the Assets of a Foreign Corporation When It No Longer Had Property Within the State of New York

In the May 23, 2006 order, this Court refers to Paul Windels III as "Receiver for North Jersey". However, to clarify this matter Mr. Windels was never appointed as a general

“Receiver for North Jersey”. Article 12 New York Business Corporation Law upon which this Court relies specifically states that it applies to “appointment of receiver of *property* of a domestic or foreign corporation” and outlines and defines particular situations in which a receiver may be appointed by the court in certain types of pending actions. Further not considered by the Court is the fact that North Jersey Trading Corporation is a foreign New Jersey corporation. Only one of the four actions noted under Section 1202 applies to a foreign corporations namely B.C.L. §1202(a)(4) in “an action **to preserve the assets in this state**” under specified circumstances.

Jurisdiction to appoint receivers of corporations is statutory. *Davidow* 216 N.Y.S.2d 257 (Supr. Ct. Nassau Cty. 1961) The appointment of a receiver for a foreign corporation is an action in rem, and requires that the corporation have property within the state of New York. *Meyer v. Perograd Metal Works*, 256 A.D. 1077, 11 N.Y.S.2d 125 (2nd Dept. 1939) N.Y.Jur. 2d *Receivers* Section 120. Where there were no assets of the corporation within the state, there was no jurisdiction to appoint receiver of the property. In the *Application of Burge* 282 App.Div. 219, 122 N.Y.S.2d 232 (1st Dept. 1953)

The Court relies on a May 21, 1991 order for the appointment of Mr. Windels as “Receiver for North Jersey”. However, that order appointed Mr. Windels only as *temporary receiver* of the North Jersey property. It is undisputed that Windels has never qualified under that May 21, 1991 order, has never taken an oath, never posted a bond, and never served as receiver, under that order. The action terminated upon the \$4.3 million final judgment by default entered against XXXX and Herskowitz in November 1993 and against Judith Herskowitz in January 1994.

Pursuant to §1218 (a)(6) B.C.L. the appointment of a permanent receiver of the property of the foreign corporations within the state of New York is provided in the judgment limited to where 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**

No permanent receiver was appointed in the above noted 1993 and 1994 final judgments. The significant distinction as to the powers of a permanent receiver of a domestic and foreign corporation pursuant to 1206(a) B.C.L. is that a receiver of a domestic corporation is vested with title to all the property wherever situated, whereas a receiver of a foreign corporation is limited to property within the State of New York.

There is clearly no further appointment here of Mr. Windels as provided by statute. Somehow a November 20, 1995 post-judgment order would be misconstrued with vague references that it “renewed Windels’ appointment as Receiver” upon which he then filed his oath and bond in January 1996. However, any appearance that this order would clothe Mr. Windels with a corporate receivership is negated by the very admission in the instant May 23, 2006 order “that Windels received **no property** on behalf of North Jersey until September 2000”, because of an intervening New Jersey bankruptcy court case. The absence of corporate property within the state of New York is alone sufficient evidence that there was not and could not have been an appointment of Mr. Windels as receiver of the North Jersey property under the 1995 order and if there were such an appointment it would be void for lack of in rem jurisdiction.

Pennoyer v. Neff, 96 U.S. 714, 722, 727 (1878) defined proceedings in rem as a direct

proceeding against the property. The court made clear that the property must exist at the time of the order or judgment is entered and cannot be applied retroactively after judgment stated as follows:

“[Court’s] jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. “

Section 1203(a) further provides that a *temporary receiver* may be appointed only *before final judgment* in an action or special proceeding brought under Article 12 for the appointment of receiver(s), of the property of the corporation *or of the property in this state of a foreign corporation* against which an action has been brought under subparagraph (a)(4) of section 1202, pending determination of the action. Accordingly, Windels’ appointment, which was as “temporary receiver”, could not have been “renewed” in the 1995 post judgment proceeding, since a temporary receiver is provided only *before final judgment* in an action or special proceeding.

Mr. Windels was not appointed as permanent receiver nor could he have been appointed permanent receiver in that November 1995 order for the additional reason that pursuant to §1206(a) B.C.L. “a permanent receiver, upon qualifying under section 1204 (Oath and security)

shall be vested with title to all the property of the corporation”. Windels could not be vested with title to the North Jersey property, because prior to the said final judgments, North Jersey filed a voluntary petition for relief under Chapter 11 in March 1993, in the New Jersey bankruptcy court. Thereupon, pursuant to 11 U.S.C. §541(a)(1) and (d), all the legal and equitable interests and title to the property of North Jersey wherever located, vested in the bankruptcy estate, and pursuant to 11 U.S.C. § 543 all assets whatever nature had to be delivered to the bankruptcy trustee.

A trustee was appointed in October 1993 who has taken possession and assumed control over all the North Jersey property and so no title could vest in a New York receiver. Nor was there anything for Windels to liquidate as permanent receiver pursuant to §1218 (a)(6) B.C.L., because it was the bankruptcy trustee, who upon order dated August 3, 1994 liquidated the North Jersey property in a bankruptcy court cash sale to Tomer Realty for which she issued a trustee’s deed dated September 9, 1994. The trustee then retained the proceeds of the cash sale in the State of New Jersey, from which she paid all claims of creditors and administrative expenses.

The issue here is not the mere default and omission of publications but the lack of in rem jurisdiction from which Mr. Windels cannot be relieved under §1213 B.C.L. Accordingly, Mr. Windels’ untimely, charade of retroactive publication of his appointment on the initial May 21, 1991 order and that alleged reappointment of receiver under the November 1995 together with his oath and bond fail to meet requirements of Article 12 to create a receivership under its provisions upon which to make distributions to alleged creditors and to resign a nonexistent receivership and for which to collect a commission.

The March 23, 2006 Decision and Order Is Void For Lack of Subject Matter Jurisdiction Because It Cannot Create A Receiver of the Assets of a Foreign Corporation Outside of Statutory Provisions And Cannot Make Payment to Alleged Creditors Outside of the State of New York

It is not within the power of the litigants to invest a court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the court has not jurisdiction of the cause of action or subject-matter involved in a particular case, such jurisdiction cannot be conferred by consent,” *Cooper v. Davis*, 231 App. Div. 527, 248 N.Y.S. 227 (3rd Dept. 1931). It has been further held that the court acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally where it undertakes to exercise the power and jurisdiction to which the statute has no application. *Lynbrook Gardens, Inc. V. Ullmann*, N.Y. Supp.2d 888 (Supr. Ct. Nassau County 1942)

In *Morrison v. Budget Rent a Car Systems, Inc.* 230 A.D.2d 253, 657 N.Y.S., 2d 721, 724, 725 (2nd Dept. 1997) subject matter jurisdiction was described as follows:

“Subject matter jurisdiction is an ‘absolute [stricture] on the court’ in terms of its statutory or constitutional capacity to adjudicate a particular types of suits In New York, the authority of courts to adjudicate classes of cases derives ultimately from article VI of the New York Constitution. The constitutional limits that are placed upon particular courts define their authority and, hence, their subject matter jurisdiction, so that no New York court may exercise powers beyond those granted by the New York Constitution and the implementational statutes..... Even the New York Supreme Court, which has been called a court of general ‘unlimited and qualified jurisdiction....may not entertain action over which it lacks subject matter jurisdiction. ... If, a court lacks subject matter jurisdiction, the parties may not confer it on the court A judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived.”

The receivership of Mr. Windels is wholly outside of the statutory scheme provided under Article 12 B.C.L. This Court states that Mr. Windels was appointed Receiver of North Jersey

pursuant to an order of this Court dated May 21, 1991. The Court then notes "that Windels subsequently published notice of his appointment, called meeting of creditors, took his oath and filed bond pursuant to §§ 1204 and 1207" all of which relate to a temporary receiver and which Mr. Windels has donee 13 years after that 1991 appointment of temporary receiver.

It is well settled that a temporary receiver acquires only the right of possession and title remains in the corporation, and has only limited powers, pending the termination of the litigation. *Propper v. Clark* 337 U. S. 472, 69 S. Ct. 1333, 93 L.Ed. 1480 (1949), A temporary receiver has no title to the property of the corporation and assumes mere custodial rights. Nor does the appointment stay or prevent the corporation from exercising its corporate powers nor deprive the corporation's officers and directors of any of their powers. *Meltzer v. Grazi* 10 A.D.2d 869, 200 N.Y.S.2d 733, (2nd Dept. 1960) There is a marked distinction between a temporary receiver, who is a mere custodian without title and does not represent the creditors and a permanent receiver, in whom title to the corporate property is completely vested, and who represents all the creditors and stockholders and becomes the trustee of the property of the corporation for the benefit of the creditors and stockholders. *In re French* 181 A.D. 719, 168 N.Y.S. 988 (1st Dept. 1918)

All that Mr. Windels relies upon is a backdated fabricated receivership to accommodate the misappropriation of the entire corporate surplus of close to \$700,000.00 by manipulating provisions of Article 12, B.C.L. in a manner not provided under the statute, wholly without subject matter jurisdiction. Without the required appointment as permanent receiver in a bogus capacity as Receiver, Mr. Windels pretends to represent the creditors, and to take title to the corporate property to which he had no right. Without as much as the required order to show cause pursuant to §1215 continues on with a charade of publications to resign as Receiver for

which he holds no appointment.

The court laid down the principle in *Pennoyer v. Neff* supra, Ibid 724 that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory and that no State can exercise direct jurisdiction and authority over persons or property without its territory. The property of a foreign corporation within the state may be used only to satisfy the claims of the citizens of the state. The New York courts likewise adheres to this principle as expressed in *Stephen v. Zivnostenska Bank, National Corporation*, 140 N.Y.S 2d 323 (Supr. Ct. N.Y. Cty. 1955) The purpose of statute providing that an action may be instituted for appointment of receiver of assets of foreign corporation within state is to protect domestic creditors. Accordingly, there was no extraterritorial jurisdiction nor any provision under Article 12, B.C.L. for the payment of unliquidated claims to the Florida attorneys Eric C. Christu, for \$105,000.00; Clifford Hark, for \$25,000.00 and Carlton, Fields for \$,2,500,00.

That November 1995 Order Was Entered Only On A Notice for the Appointment of a CPLR 5228 Post-judgment Receiver And Cannot Reach Beyond That

It is well settled that motions cannot be granted merely for reasons orally stated by counsel, since the opposing party is entitled to be served with the papers on which motion is founded, and hence is entitled to know all the grounds for the motion and the decision of the court cannot be based simply upon oral statements of counsel and that was all that was before the court at the time of the granting of this motion. *Jenkins v. Warren* 25 App. Div. 569, 50 N.Y.S. 957 (1st Dept. 1898)

The phrase “lack of jurisdiction” is not limited to jurisdiction over the person or subject matter only, but is broadly construed, and applies to an order, that includes a motion decided when

none in fact was made or where the prima facie case for such an order was neither alleged nor proved. *Uni-Serv Corporation, v. Linker*, 62 Misc.2d 861, 311 N.Y.S.2d 726 (Civ.Ct. N.Y. 1970)

As shown above Mr. Windels could not be “reappointed” temporary receiver of the assets of North Jersey following final judgment, because pursuant to §1203 B.C.L. a temporary receiver can be appointed only before final judgment. That appointment had to be as permanent receiver pursuant to §1218(a)(6) for which there is not a trace in that November 20, 1995 order. The Order to Show Cause dated September 28, 1995 upon which that November 20, 1995 order was entered was made on the ground of CPLR §5228 for plaintiff as the judgment creditor on behalf of North Jersey for enforcement of the derivative money judgment against property of judgment debtor. Moreover, no notice was served on the trustee who represented the corporation at the time so that North Jersey could not be bound by any alleged appointment of corporate receiver.

Supplementary proceedings authorizing the appointment of a “receiver of the property of the judgment debtor are creatures of statute and the powers and title of the receiver are no broader than the statute authorizes. *Maurice v. Travelers Ins. Co.*, 121 Misc. Rep. 427, 201 N.Y.S. 369 (Supr. Ct. N.Y.Cnty 1923) The power to appoint statutory receiver, in a supplementary proceeding by judgment creditor, is derived from statute and is not derived from court’s equity powers. An equity receiver is merely a custodian of the property consigned to his custody, to which he has no title, wherein a statutory receiver has such power and authority as the statute under which he is created gives him. A receiver in a supplementary proceedings takes legal title to all of the personal property of the **judgment debtor** existing at the time of his appointment, but clearly not to the corporate property as Windels would have it. *Frank v. Lutton*, 267 A.D. 703, 48 N.Y.S.2d 136 (3rd Dept. 1944)

A CPLR 5228 receivership is only for the benefit of judgment creditor who makes application therefor and does not inure to benefit of anyone else until extended to that other party. *Ferh v. First Americana Corp.*, 31 A.D.2d 967, 299 N.Y.S.2d 214 (2nd Dept. 1969) The only judgment creditor named in that November 21, 1195 order was plaintiff on behalf of North Jersey and so Windels could not act on behalf of the five lawyers named in his motion.

Furthermore, in the Affirmation in support of the September 28, 1995 motion Steven Dellibert counsel for plaintiff verified that “all creditors have been paid; and the Trustee has informally estimated that at least several hundred thousand dollars remain for distribution to the shareholders.” he further stated that he would like the remaining proceeds to be turned over to this Court to resolve the disputes among the parties and asked only for the appointment of a neutral custodian.

Upon having received those funds in this Court Delibert and Windels are judicially estopped from claiming that Windels is acting as Receiver of the Assets of North Jersey for distribution as prearranged to Charney Delibert and others. Judicial estoppel is an equitable doctrine which precludes a party from asserting a position in a legal proceeding that contradicts or is inconsistent with previously asserted position. See *Woodson v. Mendon Leasing Corp.* 259 A.D.2d 304, 686 N.Y.S. 2d 411 (1st Dept. 1999) (Where parties previously prevailed on their argument that Mandon was not a party to the default judgment plaintiffs were judicially estopped by their previous position from arguing that default judgment against other party had res judicata or collateral estoppel effect on defendant.) Simply stated judicial estoppel binds the parties to their prior position and prevents a party from asserting a contradictory position in the same or different actions.

Additionally, that November 1995 order named only the property of debtor XXXX Herskowitz and made no mention of any property of Judith Herskowitz because she had no property within the State of New York. In *Berman v. Goldstein* 254 App. D. 620 3 N.Y.S.2d 93 (4th Dept. 1938) a judgment creditor's motion for appointment of receiver for property of judgment debtor was denied where evidence disclosed no property of defendant subject to receivership. So, that CPLR 5228 Receivership does not extend to Judith Herskowitz.

The Full Satisfaction of the Derivative Judgment That Included the Counsel Fees Extinguished the Claim For Fees

The Court has repeatedly totally omitted any reference to the full satisfaction of the judgments from all of its orders. The full satisfaction of that derivative judgment including fees, alone eliminates the fees, which cannot be a reason to avoid the satisfactions. The Court knows that these judgments are based on the same injury, the damages are unapportioned between the defendants and Judith, XXXX and Herskowitz, were made jointly answerable for the wrongs alleged against them, which is the same as to the other judgments. The common law of joint and several tort liability is the law of the New York, which is binding on this Court holding that

"satisfaction of a judgment rendered against one tort-feasor discharges all joint tort-feasors from liability to the plaintiff."

Velazquez v. Water Taxi, Inc., 49 N.Y.2d 762; 403 N.E.2d 172; 426 N.Y.S.2d 467, 468 (1980) and Vincent C. Alexander, *Practice Commentary* to McKinney's CPRL C1401:1, 1996.

Velazquez, relies on Restatement of Judgments §95, further explaining the application of the above stated rule, that it does not matter if there is one judgment, two judgments, because it is "The discharge of a judgment against any one of several persons liable for a single harm or

breach of duty, owed by all, discharges the others.” *Gallivan v. Pucello*, 38 A.D. 2d 876; 329 N.Y.S.2d 211 (4th Dep't 1972) reiterated the rule that where there are two judgments based on the same injury, "Even though separate judgments are recovered against joint tortfeasors, the satisfaction of one judgment discharges the other from liability."

It is the primary rule that though several may be sued for a single injury, and recoveries had against them, there can be only one satisfaction. *Collins v. Smith*, 8 N.Y.Supp. 794; 255 App.Div. 665 (2nd Dep't 1939) *Makeun v. State of New York*, 98 A.D. 2d 583; 471 N.Y.S.2d 293, 297 (2nd Dep't 1984) makes clear that full satisfaction of a judgment in a settlement is not that a money judgment is paid dollar for dollar by the judgment debtors but, that the compromise for a lesser sum on the judgment is accepted by the judgment creditor as full payment, because “an obligation is met when the parties enter into a settlement, even though that settlement is for less than the judgment.” Also see, *Rock v. Reed-Prentice Division of Package Machinery Co.*, 39 N.Y. 2d 34; 346 N.E.2d 520; 382 N.Y.S 2d.720, 723;(1976); *Blanco v. J & H Associates* 177 A.D. 2d 370; 576 N.Y.S, 2d 124 (1st Dep't 1991) holding that once the judgment is satisfied it is deemed to constitute the plaintiff's election of his or he remedy...and a claim inconsistent with that election may not thereafter be asserted.

As has been shown, the law does not permit such inequity and injustice that one judgment debtor would be liable for the whole \$4.2 million judgment while two other jointly liable judgment debtors would pay a relatively nominal sum. New York General Obligations Law Sec. 15-108 allows a plaintiff to settle his claim with one of several jointly liable tortfeasors without prejudicing his right to pursue the other tortfeasors, “only where there has been a settlement in which a plaintiff discharges one of several tortfeasors prior to a verdict [or judgment].” (Emph.

supplied), which would be a partial satisfaction in the form of a release See, *Practice Commentary* by Vincent C. Alexander, to McKinney's CPRL C1401:6, 1996. Section 15-108 specifies that this does not apply to settlements after judgment because, "the purpose of Section 15-108 is to encourage settlement when a tortfeasor's obligations have not yet been determined. After judgment, this purpose is no longer operative."

There is No Entitlement to Fees

The corporate surplus of close to \$700,000.00 was on deposit in the bankruptcy trustee's account and was transferred to Windels. It was held *In Re: Kraemer* 40 A.D.2d 1053, 338 N.Y.S.2d 913, (3rd Dept. 1972) that the receiver was not entitled to commissions on the amount which was on deposit in the corporate bank account, when he assumed his duties, nor on the interest generated thereon, since such sums were not received and disbursed by him.

CPLR §6404 applies to an accounting by a CPLR 5228 receiver and is limited to the funds collected on the judgment. Windels collected nothing. He merely seized the corporate asset that was transferred from the New Jersey Bankruptcy Court.

Furthermore, plaintiff sought "*individually and on behalf of North Jersey* Trading Corporation ("North Jersey") expenses and legal fees" on pretense of New York Business Corporation Law §626(e) (Exhibit 1) without regard that Section 626(e) applies strictly to a *derivative suit* in which the court "may award plaintiff... reasonable expenses including reasonable attorney's fees", so that Charney individually was not entitled to counsel fees under the American Rule. Delibert was the only attorney who participated in the alleged derivative suit, for which he was compensated in the bankruptcy court, all other fee issues were also

disposed and the surplus was transferred free and clear of all claims. Livingston a New York attorney and Christu, Hark and Carlton Fields the Florida attorneys, never appeared in the New York derivative case, pursued no derivative suit, domesticated no New York judgment, collected no moneys on the New York judgment and held no judgment for fees from the Florida courts or any court to enforce in the New York court.

CONCLUSION

For all the reasons set forth herein, the within motion should be granted in its entirety together with such other and further relief as to the court may appear just and proper.

Dated: July 19, 2006
Miami Beach, Florida

Respectfully submitted,

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