

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.

**REPLY AFFIDAVIT TO WINDELS'
OPPOSITION TO MOTION
TO VACATE DECISION AND
ORDER OF APRIL 22, 2004;
AND OF OCTOBER 18, 2004 ETC.,**

Index No. 24517/88

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

JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. That I am named as a defendant in the above entitled case and make this affidavit on personal knowledge, without submitting to the personal jurisdiction of this Court, in Reply to Paul Windels' Memorandum of Law in Opposition to Motion to Vacate consisting for the most part of a Statement of Facts without any supporting Affirmation and to his one page Affirmation in Opposition to Motion to Vacate.

2. Windels' Memorandum is replete with misrepresentations on the issue of personal jurisdiction. Windels dwells in great length on that contrived default on November 18, 2004, entered against me when I was unable appear personally in this Court, because of the untimely receipt of the suspension orders. Windels resorts to that default, and ad hominem attacks against me, as a diversion from the fact that it was established at this Court's June 21, 2003 hearing, that the judgments had been fully satisfied together with fees, rendering unlawful and illegal Windels' disbursement of the North Jersey surplus of approximately \$700,000.00 to Charney and

her associates, for which he has failed and refused to account.

3. Contrary to Windels' contention, the issue of personal jurisdiction cannot be rejected by this Court or by the Appellate Division in this case. In issue here is the constitutional right of nonresidents domiciled in the State of Florida to raise the issue of absence of minimum contact, that foreclosed this Court from asserting personal jurisdiction. While Windels would dwell on his ingenious misrepresentations that the Herskowitzes' motion to dismiss for lack of personal jurisdiction was denied by order of the Court, no such order exists. To the contrary, an examination of the orders that Windels refers to and of the record show the Court avoided ruling on our motions to dismiss, because of the insufficiency of service and Plaintiff's inability to establish long arm jurisdiction over Fried and the Herskowitzes, as demonstrated by the documents attached hereto for the Court's convenience, noted as Exhibits 1-15.

Windels Produced No Order That Determined Personal Jurisdiction over the nonresident Herskowitzes and Fried in His Unsupported Memorandum and Argues Only Orders and Decisions that Avoided to make that Determination For Inability to Find Personal Jurisdiction

4. The issue of lack of personal jurisdiction was fully briefed in my companion motion to vacate returnable on October 28, 2004 which is still pending. That motion was supported with substantial documentary evidence and an Affidavit sworn to on September 1, 2004 ("Herskowitz Affidavit") to which Windels filed no Affirmation in Opposition and Plaintiff likewise filed no Affidavit in opposition. It is upon these uncontested facts that the following is based on, as referenced to the specific paragraphs in the Herskowitz Affidavit

5. It is stated on page 4, ¶9 in the Herskowitz Affidavit that what Plaintiff attempted to serve on the Herskowitzes and Fried on or around December 20, 1988 was only a motion in the

form of an Order to Show cause for a Preliminary Injunction and Temporary Restraining Order issued on December 13, 1988 on Plaintiff's ex-parte application. Plaintiff attempted to restrain the defendants from taking certain steps with regard to a corporate change in the tax status and to obstruct the refinancing of a mortgage that was due on the North Jersey real property (Exhibit 1).

6. The motion was supported among others with Plaintiff Charney's Affidavit in which she stated in ¶2 that "Annexed hereto is my Verified Complaint" in support of her motion, so that there was no separate service of a complaint, but only as part of the motion. In that Verified Complaint Plaintiff sought, a declaratory judgment to declare herself a shareholder of North Jersey, without showing any basis for her claim for 40 shares of the 100 issued and outstanding shares of North Jersey; also the dissolution of North Jersey; damages for herself for three million dollars; for all which she sought judgments personally against the Herskowitzes and Fried. To gain personal jurisdiction, Plaintiff falsely asserted that they were citizens and residents of the State of New York, when in fact they were permanent residents of the State of Florida and not of New York (Page 5 ¶11 of the Herskowitz Affidavit)

7. The Herskowitzes and Fried responded with motions to dismiss dated January 10, 1989 (Exhibit 2) among others on the ground that Plaintiff commenced no action for failure to serve the required summons; and the attempted personal service and the substituted service of the Order to Show Cause were deficient. Fried and the Herskowitzes also maintained that they were not amenable to long arm jurisdiction of the New York court or to extra-territorial service of process, because they had not committed any act or engaged in any activity in New York; they had no legal relations with Plaintiff, which could be construed as subjecting them to the jurisdiction of the New York courts, and that her claim for stocks in North Jersey, a closed foreign

corporation, was not within the New York courts' jurisdiction (Herskowitz Affidavit page 5 ¶11).

8. In January 1989, Plaintiff moved the court to allow her to serve a Verified Petition, amending her complaint, to add a derivative suit on behalf of North Jersey. By order dated March 8, 1989, Justice Jacqueline Silbermann denied Charney's Motion for Preliminary Injunction and Temporary Restraining order; advanced the return date of the Herskowitzes motions to dismiss from June 26, 1989 to March 21, 1989 and set it down for a traverse hearing expressly stating that it was on the service of the Order to Show Cause; and granted Plaintiff's motion to serve an amended complaint but only upon "the disposition of the traverse hearing".

9. Although a traverse hearing was commenced before Justice Gangel Jacob on May 10, 1989, it was terminated on the dismissal of the case, without any determination of personal jurisdiction. On Plaintiff's Motion to Reargue, claiming that her papers were overlooked, by order dated March 29, 1990, Justice Silbermann vacated her June 19, 1989 dismissal order (Pages 5 and 6 ¶ 13 of the Herskowitz Affidavit).

10. By letter dated April 9, 1990, addressed to Justice Silbermann the Herskowitzes stated that they wished to withdraw their motion objecting to that portion of the March 8, 1989 order, which accelerated the return date of their Motions to Dismiss from June 13, 1989 to March 21, 1989 (Exhibit 5), because the issue became moot when Justice Silbermann had rescheduled the return date of their motion for May 12, 1989 at which time they had appeared.

11. Justice Silbermann entered her May 8, 1990, that allowed the Herskowitzes to withdraw their "motion to renew, reargue and to vacate order (#012), that was returnable on May 8, 1989". It was this innocent application for the withdrawal of an objection to a scheduling motion, that was then fictionalized by Justice Tompkins to be a withdrawal of the "jurisdictional claim" as shown below. This despite the fact that in her May 8, 1990 order, Justice Silbermann

directed that the traverse hearing on those parts of the motions which related to the “service of the order to Show Cause” on all defendants be resumed before Justice Gangel Jacob (Exhibit 4). It is this May 8th order that was also fictionalized as having “denied” our motion to dismiss, despite the fact that no traverse hearing was completed and so, there was no determination on the sufficiency of service and long arm jurisdiction, the constitutionally required minimum contact of the nonresident Herskowitzes and Fried. Furthermore, in her May 8, 1990 order Justice Silbermann recognized that Charney had no claim against North Jersey stated as follows:

“Though North Jersey is named as a party in the amended pleading and as a party in the original pleading it is neither a necessary party nor a party against whom there is asserted any right to relief from (CPLR 1001, CPLR 1002). To repeat Plaintiff’s papers, at best state a claim for stock interest in a corporation which owns realty”.

12. It is undisputed that Plaintiff conceded that she declined to continue with that traverse hearing. Justice Gangel Jacob was removed from the case without resuming that traverse hearing and the case was reassigned to Justice Harold Tompkins (Herskowitz Affidavit page 6 ¶14)

13. On Charney’s motion to default the Herskowitzes, her motion for default was denied in an April 9, 1991 decision (Exhibit 5) settled in the May 21, 1991 order, (Exhibit 6) The Herskowitzes, but not Alex Fried were directed to answer Plaintiff’s Amended Complaint,¹ This requirement had no jurisdictional significance as Windels would have it, because in a June 26, 1991 letter agreement it was expressly stipulated between Plaintiff and the Herskowitzes that the May 21, 1991 order directing the Herskowitzes to “answer” did not limit them to “answer” but,

¹ It was in this April 9 1991 decision settled in the May 21, 1991 order that Windels was appointed the Temporary Receiver.

they could “move”.

14. Thereupon, on July 2, 1991 the Herskowitzes had filed a Motion to Dismiss, addressed to the Amended Complaint, raising their previously undecided defense of lack of personal jurisdiction and failure to serve them with the required summons. An extensive affidavit was attached to the motion by the Herskowitzes and on behalf of Fried, demonstrating the lack of long arm jurisdiction, the absence of minimum contacts. (June 26 letter and excerpt of motion to dismiss attached as Exhibit 7) (Herskowitz Affidavit page 7 ¶16)

15. In response to the Motion to Dismiss Plaintiff through Delibert’s affirmations and memoranda of law, repeatedly acknowledged that personal jurisdiction over the Herskowitzes was not yet determined. Then, without reconvening that traverse hearing and without making a determination on personal jurisdiction, Justice Tompkins entered an order dated October 2, 1991, unsupported by the record, equating the Herskowitzes’ withdrawal of their motion to reschedule a hearing pursuant to the May 8, 1990 order of Justice Silbermann’s with the withdrawal of their “jurisdictional claim”. (Exhibit 8) Thereupon, Justice Tompkins prohibited the Herskowitzes and Fried from raising their jurisdictional defenses, because they have “repeatedly raised and reraised the issue of jurisdiction in spite of Justice Silbermann’s order of May 8, 1990 which permitted the withdrawal of the jurisdictional claim”, that as shown above was not the case. (Exhibit 8) (Herskowitz Affidavit page 7 ¶ 17)

16. In that same October 2, 1991 order Justice Tompkins deemed the Herskowitzes’ Motion to Dismiss to be a reargument of the May 8, 1990 order and upon that ground he declined to rule on their Motion to Dismiss, which is contrary to Windels’ contentions that the Herskowitzes’ motion to dismiss was denied. (Herskowitz Affidavit page 8 ¶18).

17. In a petition for writ of prohibition and mandamus to the First Department the Herskowitzes sought relief with regard to the personal jurisdictional issues but, their petition was dismissed by Corrected Order dated July 10, 1992, on the ground that their remedy was by appeal (Exhibit 9). The Herskowitzes' appeal from the October 2, 1991 order was denied on the ground that no appeal lies from an order denying a motion to reargue (Exhibit 10) (Herskowitz Affidavit page 9 ¶20). Mr. Windels again misrepresents that the Herskowitzes' motion to dismiss for lack of jurisdiction was denied in that Appellate opinion, when it was the "motion of North Jersey Trading Corporation" that was denied.

18. A further proof that personal jurisdiction was not determined by this Court are the so-called derivative judgments themselves in excess of \$4 million, entered by Justice Tompkins on November 22, 1993 against XXXX and XXX Herskowitz (Exhibit 12 and the same judgment entered against Judith Herskowitz on January 21, 1994 (Exhibit 14). Conspicuously missing from these default judgments is the requirement pursuant to CPLR 3215(f) of the "proof of service of the summons and complaint".

19. To obfuscate the absence of proof of service of the summons and complaint the above judgments merely recite "the proof of due service of said Motion on each of the defendants" on pages 2 and 3 respectively. As shown by these motions these were served only by first class mail and not by service of process and are totally unrelated to any "proof of service of the summons and complaint. (Herskowitz Affidavit Page 14 ¶¶ 33 and 34) (Exhibit 11 and 13)

20. Mr. Delibert conceded in sworn testimony he gave on December 29, 1993, that this alleged withdrawal of objections to jurisdiction in Justice Tompkins' October 2, 1991 order was unsupported by the record and so was pure fiction (Exhibit 15 and Herskowitz Affidavit page 8)

stated as follows:

“Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXX Herskowitz, XXXX Herskowitz and Alex Fried withdrew their jurisdictional objections in the New York court?

A. In so many words, I don't believe so.

Q. You do not have any such document?

A. I don't believe there is such a document in so many words.

Q. I am asking you if there is any such document wherein these parties withdrew their jurisdictional objections. The same parties as above.

A. I know of no document stating an expressed withdrawal of the objections.”

21. Yet, with the full knowledge of the non-existence of that withdrawal of objections, Plaintiff relied on these misrepresentations to procure the judgments in excess of \$4 million and orders of sanctions and commitment, to pursue nonresidents with harassing litigation to confiscate their property in flagrant violation of their due process rights. It is upon that void judgment that Windels makes the baseless assertion on page 2 of his Memorandum that this judgment remains unsatisfied.

Windels' Affirmation of December 13, 2004

(A) No Notice of Settlement Was Received by Judith Herskowitz

22. Mr. Windels' Affirmation has no relevance to the Motion to Vacate, in which he claims that he had received “a copy of a notice of settlement of an order suspending an order of commitment entered in *Matter of Herskowitz v. Hon. Harold J. Tompkins*, Index No. 23002/92 shortly after October 30, 2003". I have not received any such notice of settlement. At any rate there were two suspension orders and not one, which I received only after they were filed on November 12, 2003, the week of November 17, 2004 one under the above noted Index No

23002/92 and another under Index No. 24517/88.

**(B) Windels' Claim That He is Receiver of North Jersey is Unsupported
by the Record**

23. Mr. Windels' repeated claim that he is the "receiver of the assets of North Jersey Trading Corporation ('North Jersey'), pursuant to this Court's order of May 21, 1991" or that he is the Receiver of North Jersey under that May 21st order is yet another intentional misrepresentation, unsupported by the record of this Court. As evidenced by a copy of that May 21, 1991 order under Index No. 24517/88, (Exhibit 6 pages 7 and 8) Mr. Windels was appointed only as **"temporary receiver of the property of the defendant North Jersey Trading Corporation"**. He was required to post a bond of \$50,000.00 which he never did and he never qualified and never served as temporary receiver under that May 21, 1991 order (Exhibit 1).

24. At any rate that temporary receivership of the property of North Jersey terminated upon the entry of the derivative judgments in excess of \$4 million dated November 22, 1993 and January 21, 1994. (Exhibit 2 and 3 respectively) which did not continue that receivership of Mr. Windels.

WHEREFORE, the motion to vacate the orders of April 13, 2004 and October 13, 2004, and for reargument and to renew should be granted in all respects and Judith Herskowitz should have such other relief as may to the Court appear just and proper.

JUDITH HERSKOWITZ

SWORN to before me
this 17th day of December 2004

Notary Public - State of Florida