

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

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

Judith Herskowitz respectfully submits her Reply to the Memorandum of Law of Paul Windels III, the alleged receiver pursuant to an Order dated May 21, 1991 (“Windels”) submitted in opposition to Herskowitz’s motion to vacate Decision and Order of April 22, 2004 and October 18, 2004 etc.,

**Charney Has Defaulted and Windels Is Without Authority as Receiver
Of North Jersey, Since That May 21, 1991 Order Is No Longer in Effect**

Although Windels has once more inserted in the introductory paragraph of his Memorandum the name of “Susan Charney *pro se*”, this does not constitute an appearance and opposition by Charney, and is yet another fraudulent attempt to obfuscate the fact that Charney had defaulted. Charney has not signed any Memorandum of law to act *pro se* as required under 22 NYCRR §130.01, Charney has failed to file and serve the required Notice of Appearance to act *pro se*, and failed to submit a supporting affidavit. Nor has it been shown that a *pro se* litigant can join in with a represented party.

Moreover, even if Charney had appeared *pro se* (which is not the case) she could not

appear in proper person on behalf of North Jersey. As noted before, in stockholder derivative suit the substantive right of a stockholder is that of the corporation and not that of the stockholder. Since a corporation may not appear except through an attorney, likewise the representative shareholder cannot appear without an attorney. *Phillips v. Tobin*, 548 F.2d 408, 411 (2nd Cir. 1976). Therefore, Herskowitz's motion is wholly unopposed by Charney in any capacity.

Windels purports to rely on a May 21, 1991 order entered pursuant to BCL §1202 appointing him as Temporary Receiver of the property of North Jersey. However, Mr. Windels never served as receiver under that May 21st order and at any rate that receivership terminated upon entry of the derivative judgments dated November 22, 1993 and January 21, 1994. For a temporary receiver to continue as receiver following entry of a final judgment, BCL §1203 requires that the appointment be continued in the final judgment, which was not the case here.

Accordingly, Windels lacks standing to act on behalf of North Jersey and his opposition is a sham, bad faith attempt to obstruct the entry of an order vacating the above noted void orders. Furthermore, Windels once more improperly relies on facts in his Memorandum of Law under "Statement of Facts" in violation of the rule of the Uniform Rules of Trial Courts of the Supreme Court of New York §202.8 mandating that "Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law."

A memorandum of law is unsworn and is not a filed paper. Assertions of fact contained in a memorandum of law may not be considered in disposition of a motion. *Woodley v. State*, 88 Misc.2d 561, 390 N.Y.S.2d 561 (Ct. Of Claims N.Y. 1976) Where the State relied merely on a memorandum of law in opposition to the motion the court has treated all allegations in the moving papers as true. Thus, Herskowitz's affidavits have to be treated as true.

Had Windels and Charney Not Secreted the Satisfaction of Judgments There Would Have Been No Basis for Their Motion for Distribution and to Default Herskowitz and since Those Satisfactions Were Unavailable to Herskowitz They Can Be Presented on a Motion to Renew

To defraud Herskowitz of the North Jersey surplus and to appropriate it for themselves Windels and Plaintiff failed and refused to file the satisfaction of judgments with the Clerk of this Court, and to serve copies of same on Judith Herskowitz as mandated under CPLR § 5020. They then resorted to misrepresentations that the satisfaction were merely partial satisfaction, and asserted these did not discharge Judith Herskowitz as well¹. But, to their miscalculation Judith Herskowitz finally obtained true and correct copies of the satisfaction from other sources which clearly, show that the judgments including the derivative judgment in excess of \$4 million had been “wholly paid” including the “fees”.

The rehashing the events of the November 18, 2003 default, into which Herskowitz was

¹ Windels attempts to support his questionable position with irrelevant matters that are inconsistent, are founded on misrepresentations, or are personal attacks against Herskowitz. Among these he has the audacity to assert that Herskowitz should have purchased full price airline tickets. Obviously, Windels refuses to acknowledge that around holidays as time gets nearer the prices increase. Also that Herskowitz is appearing pro se because she refused to pay counsel fees for representing her in this matter, when Charney who received substantial sum from his distribution is appearing pro se, claiming lack of funds and Herskowitz a majority shareholder received nothing and the all the corporate assets were confiscated from her. Windels claim that Charney is a 40% shareholder of North Jersey pursuant to her pleading 20% of that since 1958 is false when it is Hedy and Alex Fried who owned the shares at that time. Windels further says that Charney claimed that the Herskowitzes misappropriated income from North Jersey that rightfully belonged to her and so the Court entered a \$4.3 million “derivative” judgment against Herskowitz that remains unsatisfied. By that he would claim that Charney was entitled to 100% of the alleged income. However, it remains unrebutted that pursuant to Charney’s testimony on May 13, 1996 all the income belonged to Alex Fried and that she never received any income or dividends. The excerpts of this testimony are attached as Exhibit 28, to Herskowitz’s September 1, Affidavit in support of the motion to vacate submitted on October 28, 2004. Furthermore, if that income belonged to her personally then she had no derivative suit upon which to distribute the North Jersey surplus.

forced by the misconduct of Windels and Plaintiff, and by their threats of arrest should Herskowitz appear in this Court, does not obliterate their fraudulent acts culminating in the distribution of the North Jersey surplus. Had those satisfactions of judgments been acted upon by Windels as required under CPLR §5020, there would have been no basis for that May 29, 2003 Motion for Distribution and for any hearing on that motion, upon which to default Herskowitz.

Without regard that the satisfactions of judgment were authenticated by Windels and the late Steven Delibert, attorney for Charney before this Court at the June 21, 2004 hearing and were accepted and recognized by this Court as full satisfaction of the derivative judgment in excess \$4 million and of other judgments, Windels continues to act in a state of denial. Windels still attempts to rely on Plaintiff's Memorandum dated October 14, 2003 in which Plaintiff advocated the false argument of a partial payment that did not release Herskowitz, because the \$150,000.00 did not fully pay for a \$4 million judgment.

Since those satisfactions were not available to Herskowitz prior to that November 18, 2003 default, that default clearly cannot bar a motion to renew based on subsequent events. In fact they were not made available to her until close to the June 21, 2004 hearing. A motion to renew is not narrowly tailored as Windels would have it. Contrary to Windels' contentions in *Garner v. Latimer*, 306 A.D. 209, 761 N.Y.S. 2d 657(1st Dept. 2003) upon which he relies, holds that the rule is not inflexible and renewal can be granted, in the interest of justice, upon facts known to the movant at the time the original motion was made. *Lee v. Ogden Allied Maintenance*, 226 A.D.2d 226, 640 N.Y.S.2d 560 (1st Dept. 1996) held that a motion to renew is properly granted where new information arises which existed at time prior motion was made and

is relevant to moving party's claim, but which was unavailable or unknown to that party at time of original motion. Also see *Azzopardi v. American Blower Corporation* 192 A.D.2d 453, 596 N.Y.S.2d 404 (1st dept. 1993) renewal motion could be granted where new facts were advanced not previously available. In *Pinto v. Pinto*, 120 A.D. 2d 337, 501 N.Y.S.2d 835 (1st Dept. 1986) the court went as far as holding that discretion to grant renewal is acceptable even upon facts known to the movant at the time of the original motion.

Herskowitz had attempted to procure the satisfaction of judgments from Windels and Charney prior to the time that Charney's motion was returnable, but they failed and refused to comply. The satisfactions rebut Charney's claim of partial settlement and renewal is warranted. The satisfaction of judgment is a valid defense *Bundt v. Embro*, 27 A.D. 931, 278 N.Y.S.2d 770 (2nd Dept. 1967) Attached to the moving affidavit as Exhibit 6, is a Memorandum of Law used on Herskowitz's prior motion to vacate which cited the cases this Court acknowledged to be controlling on the issue of satisfaction of judgments. In none of those cases was a valid satisfaction ever refused by the court.

The Court Had Not Acquired Personal Jurisdiction over the Nonresident Herskowitzes and Fried Where There Was an Absence of Minimum Contact and No Fees Can Be Awarded for Obstruction of This Constitutional Issue

It is well settled that exercise of jurisdiction under due process standards requires the presence of certain minimum contacts necessary to bind an individual to any judgment to be entered. *Katz v. NVF Co.*, 100 A.D. 2d 470, 473 N.Y.S. 2d 786 (1st Dept. 1984) A long line of United States Supreme Court decisions had established the requirement of minimum contact before a court may assert jurisdiction over a nonresident. See, *International Shoe Co. v.*

Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1997); *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980); and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288, 100 S.Ct. 559, 562, 62 L.Ed.2d 490 (1979) wherein the court stated in no uncertain terms that:

“As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exists “minimum contacts” between the defendants and the forum state. *International Shoe Co. v. Washington*, supra, at 316, 66 S.Ct., at 158. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system”.

Improper exercise of jurisdiction by state courts over nonresidents infringes due process guarantees. *Longines Witnauer Co. v. Barmes & Reinecke Inc.* 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965). Due process requires both adequate underlying basis for court’s assertion of personal jurisdiction and service of process that is reasonably calculated to give actual notice of proceeding. *In the Matter of Pamela v. Ray J.* 105 Misc. 2d 743, 432 N.Y.S.2d 838 (Family Ct. N.Y.County 1980). The New York Court of Appeals held in *Ferrante Equipment Co. V. Lasker-Goldman Corp.* 26 N.Y.2d 280, 309 N.Y.S.2d 913 (1979) the fact that defendant is a controlling shareholder does not constitute minimum contact for purpose of New York’s long arm statute.

Windels relies on *Charney v. North Jersey Trading Corporation*, 587 N.Y.S. 2d 144 (1st Dept. 1992) which involved an appeal from Justice Tompkins’ order dated October 2, 1991 entered on October 16, 1991, which in turn relied on the May 8, 1990 order of Justice Silbermann. That May 8th order merely set the issue of service down for a traverse hearing and made absolutely no determination on minimum contact to constitute a determination on personal

jurisdiction, for Plaintiff to rely on for the past decade upon which to literally persecute the Herskowitzes for pecuniary gain. Although the absence of long arm jurisdiction was actively raised by the Herskowitzes in their affidavit to their motion to dismiss (Exhibit 7) this Court has never found any act pursuant to New York long arm statutes CPLR § 301 and CPLR § 302.

Pursuant to CPLR §320(b) an appearance of the defendants does not confer personal jurisdiction on the court, where an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided under rule 3211. Also see *Calloway v. National Service Industries*, 83 A.D. 2d 734, 461 N.Y.S.2d 280 (1st Dept. 1983) In accord *Colbert v. International Security Bureau* 79 A.D. 448, 437 N.Y.S.2d 360 (2nd Dept. 1981)

Participation in defense of the action doe not waive defense of lack of personal jurisdiction asserted by motion or contained in the answer. That the Herskowitzes appeared in this Court to contest jurisdiction over their person, did not allow this Court to assert jurisdiction over their person in the absence of minimum contact and to punish them with sanctions and warrants of arrest for the exercise of their due process rights. It likewise furnished no basis for Charney's attorneys to reward themselves with approximately \$700,000.00 of the North Jersey surplus for opposing these constitutional rights.

In her initial complaint Charney sought a declaratory judgment to be declared a shareholder of North Jersey. Business Corporation Law §626 which provides that a shareholders' derivative action in the right of the corporation can be brought only by a holder of shares of the corporation. So, a determination as to whether Plaintiff was a shareholder was a prerequisite to her pursuing a derivative suit. This requirement was expressly stated in *Center v. Hampton*

Affiliates, Inc., 66 N.Y.2d 782, 488 N.E.2d 828, 497 N.Y.S.2d 898 (1985) where the ownership of the corporate stocks were in dispute the court ruled that:

“Inasmuch as plaintiff’s right to maintain a shareholder’s derivative action depends upon his success on his individual causes of action, the derivative claims should be severed and held pending disposition of plaintiff’s individual claims. “

Accordingly Charney’s claim for declaratory relief on the North Jersey shares were required to be resolved first. However, for declaratory relief all shareholder must be joined.

“All persons who have or claim an interest in the subject matter of the action for declaratory judgment or who may be affected by the result must be joined as necessary parties...in the present action ,two owners of stock ...have not been joined as parties, either by plaintiff or defendants. It cannot be doubted that the rights of these two individuals will at the very least may be effected by any declaration such as the defendants seek here. A declaratory judgment as to these persons, therefore would be a mere academic pronouncement without judicial consequence. Under these circumstances, this court must refuse to grant such declaratory relief until all necessary parties are before it.”

Sassower v Himwich, 236 N.Y.S. 2d 491, 495 (Sup. Ct. N.Y. Co. 1962) *aff’d* 19 A.D. 2d 946 (N.Y> 1st Dept. 1963). Accordingly, personal jurisdiction was required over all the defendants Judith, XXXX and XXX Herskowitz and Alex Fried which Charney failed to establish.

WHEREFORE, by reason of the un rebutted facts, the lack of opposing papers by Charney in any capacity, and Windels’ sham unauthorized and dishonest opposing memorandum, Herskowitz is entitled to the vacatur as mandated by law.

Dated: December 17, 2004
Miami Beach, Florida

By: _____
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