

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

IAS Part 30 Heitler J.

Index No. 24517/88

**REPLY MEMORANDUM OF LAW TO WINDELS’
OPPOSITION TO MOTION TO VACATE ORDERS AND JUDGMENT**

Judith Herskowitz respectfully submits her Reply to the Memorandum of Law and Affirmation 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 the January 21, 1994 judgment; the January 19, 1993 contempt order for discovery violation; the February 19, 1993 Order of Commitment and the January 19, 1993 order entering declaratory judgment by default.

In view of the fact that Charney defaulted and Windels is without authority to litigate in the above entitled case, his opposition to the instant motion is a nullity. Windels lacks authority, because there is no May 21, 1991 order in effect appointing him Receiver for North Jersey Trading Corporation (“North Jersey”) and there is no order authorizing to retain his law firm as counsel for the receiver. Accordingly, Windels’ opposition is a sham, bad faith attempt to obstruct the entry of an order vacating the above noted void orders and judgments. The sole objective of Windels’ opposition is to falsify the facts and mistate the law, so as to obfuscate his complicity in the defalcation of corporate funds with what is now an admittedly fraudulent \$4.3 million derivative judgment whose procurement was made possible with false arrest warrants.

Charney Has Defaulted and Windels Is Without Authority to Litigate as Receiver of North Jersey under The May 21, 1991 Order

Although Windels inserts 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 a 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. 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. In a 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 has never qualified, and never served as receiver under that May 21st order. The above entitled case was terminated upon entry of the judgment dated November 22, 1993 and judgment dated January 21, 1994 (Attached as Exhibit 18 and 19 to Herskowitz’s moving affidavit). 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. However, Windels makes no such claim, knowing that no such appointment was made. Because his status as temporary receiver was terminated by the aforementioned final judgments, there exists no lawful basis for .

Windels to cast himself in the role of Receiver for North Jersey.

In addition Windels also purports to act as “Attorneys for Paul Windels III Receiver”. This also fails to meet requirements of Part 36 H of the Administrative Order of the Chief Judge providing that a counsel retained by the receiver becomes a Part 36 appointee and the receiver must request that the judge appoint such a professional and the professional must comply with all the provisions of Part 36. No order appointing Perry & Windels as counsel for Windels III the receiver was ever made by this Court. Furthermore, neither Windels nor his law firm have been authorized to represent Charney in any capacity, so this transparently sham effort to act as her surrogate is likewise void.

Even If Windels Could Represent North Jersey His Opposition Papers Would Be Barred Because His Affirmation in Opposition Is Admittedly Without Personal Knowledge and He Cannot State the Facts in a Memorandum of Law

It is well settled that an affirmation or an affidavit in support of a motion is to be made by those with personal knowledge of the facts. In *Bova v. Vinciguerra*, 139 A.D.2d 797, 526 N.Y.S.2d 671, 673 (3rd Dept. 1988) the court denied defendants’ motions where the affidavits submitted in support of defendants’ motions were made by defendants’ attorneys and not by defendants themselves, the court stating in no uncertain terms that

“An affidavit in support of a motion is to be made by those with knowledge of the facts and: The attorney’s affidavit unless he happens to have first hand knowledge - which is the exception rather than the rule - has no probative force (Siegal, N.Y. Prac. §281, at 337). Personal knowledge is not presumed from a mere positive averment of the facts (1 Carmody-Wait 2d, N.Y. Prac. §4:28, at 644). A court should be shown how the deponent knew or could have known such facts and if there is no evidence from which the inference of personal knowledge can be drawn then it is presumed that such does not exist.”

Windels recognizes that he has no personal knowledge of the facts, and so he makes no factual

allegations in his affirmation. What he attempts to do is rely on facts in his Memorandum of Law under “Statement of Facts”. However, this is in total 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.” The same was adopted under CPLR § 2214. See, Siegel Practice Commentaries C2214:21, saying as follows: “The affidavit should contain only facts and should avoid legal arguments and conclusions”.

Also see, *People v. Ferguson*, 55 Misc.2d 711, 286 N.Y.S.2d 976 (Supr. Ct. Queens County 1968) reiterating the well settled law, that “A memorandum of law is unsworn and is not a filed paper. Consequently, assertions of fact contained in a memorandum of law may not be considered in disposition of a motion”. In *Woodley v. State*, 88 Misc.2d 561, 390 N.Y.S.2d 561 (Ct. Of Claims N.Y. 1976) the State did not present an affidavit in opposition to the motion, but merely submitted a memorandum of law. The court held that “This certainly does not meet the evidentiary showing a party must make to successfully oppose a properly supported motion.” Consequently, the Court has treated all allegations in the moving papers as true.

Accordingly, Windels’ fabrications of the facts cannot be considered by this Court in his “Statement of Facts” and the facts in Herskowitz’s affidavit have to be treated as true. Windels’ allegations are entirely contradicted by the record. Among these are that Charney “commenced a derivative action”, because the Herskowitzes “had misappropriated income from North Jersey that rightfully belonged to her”. Thus, it is conceded that Charney sought benefit solely for herself individually, and not derivatively for the benefit of North Jersey. Notwithstanding that her claims for corporate income are a sham and a fraud in view of Charney’s sworn testimony

that she was never entitled to North Jersey income; that she never received any dividends; and acknowledge that it all belonged to her father Alex Fried, and who had received that income - all of which was stated in Herskowitz' moving affidavit pg. 23, ¶ 54 and ft. note 6 and is unrebutted by Charney.

Windels takes the sequence of events out of context creates sanction orders that did not exist, miscites the affidavit of Herskowitz and inappropriately relies on the affirmation of Delibert. Clearly, Windels stated his falsified so-called facts in his Memorandum of Law to avoid being subjected to penalty of perjury under a CPLR §2106 Affirmation. ¹

¹ Windels legal arguments are equally without merit. First of all It should be noted that Windels takes up to argue that cost judgment in the sum of \$5,000 awarded in an article 78 proceeding by the Appellate Division upon which that ex parte turnover order was entered under Index No. 23002/92. Charney was a party individually and Windels is wholly without standing to argue these matters in this case under Index No. 24517/88.

As to that Inquest hearing, even if Herskowitz had retained counsel, that would not have been a solution, since it was an evidentiary hearing requiring testimony and evidence to be introduced with personal knowledge which could not have been done without personal appearance by Herskowitz.

The People v. Department of Social Services, 240 A.D.2d 786, 658 N.Y.S.2d 709 (3rd Dept. 1997) a case relied on by Windels has no relevance to this case where the issue is personal jurisdiction, by means of service of process. The parents in that case were seeking the right of custody of a child in a habeas corpus proceeding who was in the the custody of the DSS. Since neither parent had custodial jurisdiction over the child, the writ was denied.

Windels convoluted reference to *Roosevelt Hardware v. Green*, 72 A.D.2d 261, 424 N.Y.S.2d 276 (2d Dept. 1980) cited for the proposition that “laches if applicable to motion to vacate requires showing of prejudice” is a misrepresentation of the holding in the case, which states that “mere delay alone, without actual prejudice, does not constitute laches”. The only prejudice here has been to Herskowitz by Charney’s wrongful acts in procuring her orders and judgments, which as shown here is not subject to laches.

The power of the New York courts to exercise jurisdiction over a foreign corporation doing business in New York, under various New York statutes is not the issue here as presented by Windels. The issue is the power of the court over nonresidents without proof of service of process and the absence of subject matter jurisdiction to enter orders and judgments by default over matters outside of statutory authority.

It is Unrebutted That the \$4.2 Million Dollar Derivative Judgment Entered by Default was Procured by Charney by Fraud, Misrepresentation and Misconduct

It is well settled that when answering affidavits are not produced, facts alleged in moving affidavits will be taken by the court as true. *Cole v. State*, 64 A.D. 2d 1023, 409 N.Y.S.2d 306, 308 (4th Dept. 1978) In *Cole* the state was allowed to use its silence as a shield against allegations that it had notice of essential facts constituting a claim. Therefore, the court held that the lower court abused its discretion in denying the motion against the state. Also see, *Woodley v. State*, 88 Misc.2d 561, 390 N.Y.S.2d 561, 563 (Ct. Of Claims N.Y. 1976) Where no affidavit was presented in opposition the court treated the allegations in the moving papers as true and had drawn all favorable inferences therefrom.

Susan Charney as the party who pursued the litigation here, had to be fully familiar with the facts, she relied on in this case. In fact it is she who furnished the information to her attorney Steven Delibert. This is nowhere more evident than in her Post Inquest Memorandum dated March 15, 1993 (attached as Exhibit 16 to Herskowitz's moving affidavit), upon which her \$4.3 million derivative judgment by default was based. Charney retained Delibert sometime in 1988, but she relied on information as far back as 1982; i.e. on page 5 of that Memorandum it is stated that "Plaintiff [Charney] introduced evidence that the rents collected from the property in 1982" "Plaintiff further introduced certified copies of the registrations for the property....." As to the "Items of Damages" noted on page 14, it was based on the alleged "damages proved by plaintiff on behalf of the corporation at the inquest ", "the reasonable expenses", the alleged loss of rental income in the sum of \$2,016,840.59, the mortgage proceeds in the sum of \$200,000.00 and the lost value of the property in the sum of \$960,000.00.

Herskowitz's fully detailed affidavit with supporting documents in support of the instant motion, affirmatively establishes (pgs. 15 to 24) that Charney's claim for damages were outside the pleadings, that the alleged loss of rental income was fabricated by Charney based on fraudulent, inflated, hypothetical rents; on intentionally understated expenses; on false claims of misuse of the mortgage proceeds of \$200,000.00 - which North Jersey used to pay off its first mortgage - and on a fictionalized claim of diminution of the value of the North Jersey property. No affidavit in opposition had been filed by Charney to rebut these facts and evidence so as to avoid prosecution for perjury. Yet it was upon these fabricated damage claims that Charney made her perjurious claims that the Herskowitzes "looted the corporation" so that she could prevail before this Court as well as in all other courts by defaming, disparaging and demeaning the Herskowitzes. So, Windels' sham opposing memorandum is just more of the same.

The Vacatur of Orders and Judgments Procured by Fraud, Misrepresentation and Misconduct of a Party is not Barred by Laches

In *Birsett v. General Acc. Ins. Co. of America*, 659 N.Y.S.2d 924, 241 A.D.2d 683 (3rd Dept. 1997) wherein a judgment was procured by plaintiff's material and knowledgeable misrepresentation and misconduct within the meaning of CPLR(a)(3) the contention of lack of reasonable excuse for the delay of several years was rejected by the court. See, also *Gorman, Naim and Musa, etc., v. ABJ Fire Protection, Inc.*, 195 A.D. 2d 1063, 601 N.Y.S.2d 729 (4th Dept. 1993). The failure to disclose what would defeat a summary judgment warranted vacatur pursuant to CPLR 501(a)(3). In accord, *Oppenheimer v. Oppenheimer*, 47 N.Y. 2d 595, 419 N.Y.S.2d 908, 912 (1979) The withholding of relevant information at a damage inquest in order to exaggerate a default judgment required vacatur pursuant to Rule 5015(a)(3).

In View of the Fact That No Proof of Service of the Summons and Complaint Had been Provided by Charney, the \$4.2 Million Dollar Derivative Judgment Entered by Default Is Facially Void

CPLR §3215(f) relating to proof by its own terms applies to judgments entered by the clerk as well as to a judgment entered by a judge in mandating that

“On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint”.

No such proof of service of the summons and complaint was produced in opposition to the instant motion. Charney served no opposing affidavit to controvert the fact in the moving affidavit on pg. 3 ¶9 that she served the Herskowitzes only with an Order To Show Cause for Preliminary Injunction and Temporary Restraining Order issued on December 13, 1988. It is further unrebutted that it was upon this Order to Show Cause, that Justice Silbermann directed in her May 8, 1990 order, 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; that Plaintiff declined to continue with that traverse hearing; that Justice Gangel Jacob was removed from the case prior to having made a determination on the jurisdictional issues; and that the case was reassigned to Justice Harold Tompkins (pg. 6 ¶ 14 of the moving affidavit).

The facts stated on pg. 7, ¶ 17 are further unrebutted with an opposing affidavit that

“without reconvening that traverse hearing Justice Tompkins entered an order dated October 2, 1991, that misrepresented the prior May 8, 1990 order of Justice Silbermann’s by equating the Herskowitzes’ withdrawal of a motion to reschedule a hearing, with the withdrawal of their “jurisdictional claim”. Justice Tompkins prohibited the Herskowitzes and Fried from raising their jurisdictional defenses on the stated ground that 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” (Exhibit 6).

Further unrebutted with an opposing affidavit are the excerpts of Mr. Deliberts testimony

attached as Exhibit 7 to the moving affidavit showing that

“Mr. Delibert conceded at a later date 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”.

Therefore, Windels cannot deny or attempt to controvert the above noted sworn statements with claims in his Memorandum of Law that the orders of May 8, 1990 and October 2, 1991 and an appellate decision on the later order, constituted a determination on personal jurisdiction when as shown above it never did. Therefore, it is unrebutted that the \$4.3 million derivative judgment was entered by default without the required determination of personal jurisdiction and without the required proof of service of the summons, since the service was only that of an Order to Show Cause for Preliminary Injunction and Temporary Restraining Order.

Accordingly, it remains unrebutted based on the authorities cited on page 17, of the moving Memorandum of Law, that failure to comply with CPLR 3215(f) by filing proof of service is a jurisdictional defect which renders the judgment a nullity and the vacatur of the judgment is not discretionary, but is mandatory. It is further noteworthy that the court made no distinction in *Marazita v. Nelbach*, 91 A.D. 2d 604, 456 N.Y.S.2d 423,(2nd Dept. 1982) as to whether the default judgment was entered by the court or by a judge.

A Judgment That Is Void Can Be Vacated at Any Time

In *Flatbush Auto Discount Corporation v. Reich* 75 N.Y.S.2d 908 (1st Dept. 1947) a judgment was entered without jurisdiction because it failed to meet requirements in that it was not based on a verified statement. Thus, the court held the judgment was required to be vacated. The court further held that laches did not defeat the motion to vacate a judgment that is a nullity.

See, also *In re Arnold's Estate*, 40 Misc.2d 1069, 244 N.Y.S.2d 697 (Surrogate Ct. Dutchess County 1963). Laches was not a bar to reopen a void decree. See, *Rappazzo v. Nardacci* 20 Misc.2d 301, 198 N.Y.S.2d 357 (City Ct. Albany 1959) holding that a default judgment for damages granted without the required proof is a nullity, so that the motion to vacate was not limited by time. Additionally, in *McMullen v. Arnone*, 79 A.D.2d 496, 437 N.Y.S.2d 373 (2nd Dept. 1981) the court held

“that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void”.....**The person purportedly served may ignore the judgment, resist it or assert its invalidity at any and all times**On a motion to vacate such a judgment for want of jurisdiction, the court, upon finding as in the instant case that service of process was not made, must vacate the judgment absolutely, and may not impose terms or conditions upon the vacatur (**CPLR 5015, subd. (a), par. 4;**)” (Emphasis supplied)

It is further well settled that a court that acts in excess of the power granted under a statute, even with jurisdiction over the parties is void. *People v. Hart*, 206 Misc. 490; 133 N.Y.S.2d 98, 100 (Wayne County Ct. 1954) *Lynbrook Gardens Inc. V. Ullman*, 36 N.Y.S.2d 888, 892-93 (Sup.Ct.Nassau County, 1942). It is undisputed that CPLR 3126 confers no power upon a judge to enter a contempt and commitment order for discovery violation and so it is beyond dispute that the January 19, 1993 contempt order and the February 19, order of commitment are likewise void. See, *Morrison v. Budget Rent A Car, Inc.*, 230 A.D.2d 253; 657 N.Y.S.2d 721 (2nd Dept. 1997) which noted that “no New York ork court may exercise powers beyond those granted by the New York Constitution and the implementing statutes”.

WHEREFORE, by reason of the unrebutted 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: November 10, 2004
Miami Beach, Florida

By: _____
JUDITH HERSKOWITZ J.D.
Defendant Pro se
P.O. Box 403543
Miami Beach, Fl. 33140
Tel:(305) 534-7600