

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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SUSAN CHARNEY,

Plaintiff,

- against -

NORTH JERSEY TRADING CORPORATION,  
ALEXANDER FRIED, JUDITH HERSKOWITZ,  
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Defendants.  
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IAS PART 30  
HEITLER, J.

Index No. 24517/88

MEMORANDUM OF LAW IN OPPOSITION TO  
MOTION TO VACATE

Paul Windels III, a Receiver pursuant to Order of this Court dated May 21, 1991, and Susan Charney *pro se*,<sup>1</sup> respectfully submit this Memorandum of Law in opposition to the motion of defendant Judith Herskowitz to vacate the following orders and judgments entered by this Court:

- a. Order dated April 13, 2004, granting the application of Charney and the Receiver for distribution of funds held by the Receiver upon Herskowitz's failure to appear for oral argument after two final adjournments; and
- b. Order dated October 12, 2004, denying Herskowitz's application to vacate her default.

In seeking to reargue these matters yet again, Herskowitz offers no valid excuse for her failure to

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<sup>1</sup> Steven Delibert, Charney's counsel, died in July 2004. See Affirmation of Paul Windels III dated October 21, 2004, and submitted in opposition to Herskowitz's motion to vacate certain other orders and judgments in this case, ¶ 2.

appear at oral argument on a date she committed to on the record. As she has done so often throughout the maelstrom of legal chaos she has created and continues to create in this litigation, she simply recycles arguments that have failed to convince this Court. The time has come for an end to this pattern of obstruction, waste of judicial time and resources, and harassment of the parties who wish to see finality in this litigation.

#### STATEMENT OF FACTS

In bringing this motion, Herskowitz seeks again to challenge the distribution of approximately \$682,000 in funds transferred to the Receiver by the Trustee in Bankruptcy for North Jersey Trading Corp. ("North Jersey") pursuant to the order of the United States Bankruptcy Court for the District of New Jersey. *See In re North Jersey Trading Corp.*, No. 93-31620 (Bankr. D.N.J.) Memorandum Opinion dated July 10, 2000 (annexed as Exhibit D to Affirmation of Steven Delibert dated May 28/ 2003 ("Delibert 5/28/03 Aff.") and submitted in support of the application for distribution. The Receiver had been appointed in this action, which is a derivative action by Susan Charney, a 40% shareholder of North Jersey. Charney claimed that Herskowitz and defendants [redacted] and [redacted] Herskowitz had misappropriated income from North Jersey that rightfully belonged to her. Upon the failure of Herskowitz to appear at a Court ordered deposition, this Court entered judgment against her in the amount of \$4,300,024.42 on January 21, 1994.<sup>2</sup> That judgment remains unsatisfied. *Delibert 5/28/03 Aff.* ¶¶ 11-25, Ex. A, B, & C.

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<sup>2</sup> A separate judgment in the amount of \$4,251,947.87 was also obtained against [redacted] and [redacted] Herskowitz in this action. *Delibert 5/28/03 Aff. Ex. A.* Charney and the Receiver settled the claims against [redacted] and [redacted] Herskowitz in exchange for payment of \$150,000 to the Bankruptcy Trustee, which became part of the surplus transferred to the Receiver. *Id.* ¶¶ 26-29, Ex. H.

As part of a scorched earth campaign to frustrate Charney's and the Receiver's efforts to collect on that judgment, Herskowitz caused North Jersey to seek bankruptcy protection in the United States District Court for the District of New Jersey. Delibert 5/28/03 Aff. ¶¶ 16-25. On Charney's motion, the Bankruptcy Court appointed a bankruptcy trustee for North Jersey. The bankruptcy trustee sold the assets of North Jersey for an amount greater than its liabilities, generating a surplus of approximately \$663,000 (including \$150,000 paid by ~~Charney~~ and ~~Herskowitz~~ Herskowitz under their settlement with Charney and the Receiver). Because North Jersey no longer had liabilities in excess of its assets, the bankruptcy proceeding was dismissed and the surplus transferred to the Receiver. Delibert 5/28/03 Aff. Ex. D.

Charney and the Receiver applied to this Court for an order directing distribution of the Fund in May 2003. *See, generally, Charney v. North Jersey Trading Corp.*, No. 24517/88 (Sup. Ct., N.Y. Cty.) Order to Show Cause dated May 29, 2003 and supporting papers including Delibert 5/28/03 Aff. The return date for the application was adjourned until a final date of September 22, 2003. *See* Affirmation of Steven Delibert dated June 15, 2004 ("Delibert 6/15/04 Aff.") and submitted in opposition to Herskowitz's application to vacate the Court's Order dated April 13, 2004, ¶ 6. On that date, Herskowitz failed to appear for oral argument but placed a telephone call to the courtroom of Justice Heitler (who was assigned to the case). The Court granted Herskowitz a final adjournment of oral argument until October 22, 2003. Delibert 6/15/04 Aff. ¶ 6(H), Transcript of Sept. 22, 2004, telephone conference (Delibert 6/15/04 Aff. Ex. A) at 10, 13-14. Herskowitz committed to be present at that oral argument. Delibert 6/15/04 Aff. Ex. A at 10.

Herskowitz cross-moved on October 1, 2003, for a stay due to the alleged "primary

jurisdiction” of the Courts of the United States (including the Bankruptcy Court) and Florida and to vacate various orders and judgments entered in this case for alleged fraud and alleged lack of jurisdiction over the subject matter of the case and Herskowitz personally and alleging that the appointment of the Receiver was improper. *See* Memoranda of Law of Herskowitz dated October 1, 2003. Despite having cross-moved and having represented that she would be present, however, Herskowitz again failed to appear on October 22, and again placed a telephone call to Justice Heitler’s courtroom. Once again, the Court granted Herskowitz a final adjournment until November 18, 2003. Delibert 6/15/04 Aff. ¶ 6(J), transcript of Oct. 22, 2003, telephone conference (Delibert 6/15/04 Aff. Ex. B) at 13-17. The Court further agreed to vacate the orders of commitment outstanding against Herskowitz on account of her having been held in contempt of Court. Delibert 6/15/04 Aff. ¶ 6(K)(L), Ex. B at 15-17. And, once again, Herskowitz committed to be present at oral argument on November 18. In her words, she promised “I’m telling you the truth I will see you on the 18<sup>th</sup>.” Delibert 6/15/04 Aff. Ex. B at 17.

On October 31, 2003, Charney served a notice of settlement of a proposed order temporarily vacating the orders of commitment during the time period in which Herskowitz needed to be in New York to attend oral argument of the application for distribution. That notice of settlement was returnable on November 7 and was served on Herskowitz. Delibert 6/15/04 Aff. ¶ 6(L), Affirmation of Paul Windels III dated December 13, 2004 (“Windels Aff.”), Ex. A. The Court entered that order on November 12. *See* Affidavit of Judith Herskowitz sworn to May 20, 2004, and submitted in support of her application to vacate the Court’s Order dated April 13, 2004 (“Herskowitz 5/20/04 Aff.”), Ex. B. Nevertheless, Herskowitz yet again failed to appear for oral argument on November 18, and again attempted to place a telephone call to Justice

Heitler's courtroom. Based on Herskowitz's third failure to appear at a final oral argument date despite the extreme lengths the Court had taken to accommodate her, the Court found Herskowitz in default. Delibert 6/15/04 Aff. ¶ 6(O), transcript of Nov. 18, 2003, proceedings(Delibert 6/15/04 Aff. Ex. C) at 2-4. By opinion and order dated April 13, 2004, the Court granted the application for distribution of the funds held by the Receiver. The Court held:

Defendant Herskowitz has wilfully absented herself from this Court's proceedings, Particularly in light of the "bad faith procedural tactics" Ms. Herskowitz has utilized throughout this more than fifteen-year litigation, a default judgment in plaintiff's favor is clearly warranted.

Opinion, dated April 13, 2004 (Exhibit 4 to Affidavit of Judith Herskowitz sworn to November 19, 2004 in support of the pending motion ("Herskowitz 11/19/04 Aff.")) at 7.

In June 2004, Herskowitz applied by order to show cause to have her default and the April 13, 2004, decision vacated.<sup>3</sup> Herskowitz sought to excuse her default on the grounds that she did not purchase an airplane ticket to travel to New York for the November 18, 2003, argument date to which she had committed because she was uncertain as to whether or not the Court had temporarily vacated the commitment orders until that date and that she would have had to pay full fare had she purchased a ticket after the commitment orders were temporarily vacated.<sup>4</sup> Herskowitz 5/20/04 Aff. ¶¶ 4-5. She also argued that the April 13, 2004, decision should not have been rendered on the theory that the satisfaction of judgment given to █████ and

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<sup>3</sup> That order was returnable on June 21, 2004, and the Court again temporarily vacated the commitment orders so that Herskowitz could attend oral argument without the risk of arrest.

<sup>4</sup> When Herskowitz appeared at oral argument of the Order to show cause on June 21, she was accompanied by a traveling companion of some sort named Kathy Emery. Transcript of hearing held on June 21, 2004 (Ex. 5 to Herskowitz 11/19/04 Aff.), at 1-2. 30-33.

██████ Herskowitz as part of the settlement with them also extinguished the judgment against her and that the Court lacked jurisdiction to award attorneys' fees out of the proceeds of the liquidation of the assets of North Jersey. *See* Herskowitz's Memorandum of Law dated May 20, 2004.

In its decision and order dated October 12, the Court denied Herskowitz's application to vacate the April 13, 2004, decision. The Court pointed out that, had Herskowitz wished to find out whether the commitment orders had been vacated, she could have called chambers. It further held that Herskowitz's reluctance to pay full airfare did not constitute an adequate excuse for her failure to appear at oral argument. Opinion and Order dated October 12, 2004 (Herskowitz 11/19/04 Aff. Ex. 7) at 3. Finally, the Court noted that Herskowitz had failed to make any "legal argument" as to why the Court should not have directed distribution in accordance with the April 13 decision. Herskowitz 11/19/04 Aff. Ex. 7 at 4.

Herskowitz now seeks reargument or renewal of her order to show cause. In support of her motion, she contends that, during November 2003, she tried to contact Justice Heitler's chambers but that she was unable to obtain any information as to whether the orders of commitment had been vacated. Herskowitz further contends that the Court lacked personal jurisdiction over her and subject matter jurisdiction over the case, that the distribution of the fund is preempted under federal bankruptcy law, that the appointment of the Receiver was improper, that the execution of satisfaction of the judgment against ██████ and ██████ Herskowitz operated to discharge the judgment against her, and that Charney and the Receiver have sought the distribution by means of fraud.

## ARGUMENT

This motion is yet one more instance in which Herskowitz seeks to relitigate and relitigate any decision by any Court that she finds contrary to her interests. Once again, however, she fails to offer any justification for the Court in its discretion to grant reargument. *See Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept. 2001) (a motion to reargue is addressed to the discretion of the trial court).

Herskowitz still offers no legitimate excuse for failing to appear for oral argument of the underlying application for distribution of funds on November 18, 2003. Although the Receiver and Charney have no way of verifying whether she did try to find out from the Court whether the commitment orders had been vacated, she nowhere addresses the Court's observation that her refusal to purchase a full fare air ticket did not excuse her failure to appear.<sup>5</sup> Moreover, Herskowitz cannot deny that she was aware that the Court intended to vacate those orders temporarily, as the Court stated in open proceedings on October 22, or that counsel for Charney had served notice of settlement of a proposed order temporarily vacating the commitment orders on October 31.<sup>6</sup>

As a separate matter, Herskowitz's underlying reluctance to appear for oral argument absent temporary vacatur of the commitment orders results directly from her decision to litigate

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<sup>5</sup> Herskowitz's good faith on this argument is undermined by the fact that she was accompanied by a traveling companion of some sort when she did appear at argument of her application to vacate on June 21, 2004. Herskowitz 11/19/04 Aff. Ex. 5 at 1-2.

<sup>6</sup> Delibert 6/15/04 Aff. ¶ 6(J), Ex. B at 13-17. Windels Aff. Ex. A. It is also worth noting that Herskowitz has failed to provide the Court and counsel with a fax number or to maintain an answering machine at her residence despite repeated directions from the Court that she do so in order to ensure that communications from the Court and the parties can reach her. Herskowitz 11/19/04 Aff. Ex. 5 at 3-4, 30-33.

this matter *pro se* because she persistently refused to pay counsel for defending her. *See Charney v. North Jersey Trading Corp.*, 150 Misc.2d 849, 850-51, 578 N.Y.S.2d 100, 101-02 (Sup. Ct. N.Y. Cty. 1991) (allowing withdrawal of counsel for Herskowitz and her sons based on nonpayment of fees for the fourth time and directing that “the Herskowitz defendants are directed to indicate on each of the papers they serve or file their names, accurate addresses and telephone numbers”). Nothing prevented Herskowitz from retaining counsel to appear for her at the November 18 hearing except her reluctance to pay for counsel.<sup>7</sup>

By the same token, Herskowitz bears responsibility for the existence of the commitment orders through her continued disregard of court orders which led to the imposition of contempt sanctions. At all times she has been free to purge herself of those sanctions by complying with the underlying court orders. Again, she has refused to do so and must bear the consequences of that refusal.

Nor can Herskowitz recast this motion as one for renewal. As a matter of well settled law, a motion for renewal must be based on facts that were unknown to the party asserting them at the time of the original motion and could not have been known at the time. *See Garner v. Latimer*, 306 A.D.2d 209, 761 N.Y.S.2d 657 (1<sup>st</sup> Dept. 2003) (“a motion for leave to renew is intended to direct the court’s attention to new or additional facts which . . . were unknown to the movant” at the time of the original motion); *Cuccia v. City of New York*, 306 A.D.2d 2, 761 N.Y.S.2d 31 (1<sup>st</sup> Dept. 2003) (“an application to renew must be based upon additional material facts which existed at the time that the prior motion was made but were not then known to the

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<sup>7</sup> Indeed, the Court urged Herskowitz to retain counsel on Both September 22 and October 22, 2003. *See Delibert* 6/15/04 Aff. Ex. A at 3, 5, Ex. B at 10, 13.

party seeking leave to renew and a valid excuse must be offered for not supplying such facts”). Here, no Herskowitz offers no excuse with respect to any of the arguments she presses on her purported motion to renew, renewal is simply unavailable to her. See *Cuccia v. City of New York, supra* (reversing grant of renewal motion in the absence of a valid excuse for not providing facts supporting renewal on original motion).

Moreover, far from offering facts unknown at the time, Herskowitz simply repeats her arguments from the original order to show cause, arguments that in many instances date back throughout the tortured history of this litigation. Herskowitz’s contention that the Court lacks personal and subject matter jurisdiction have been rejected time and again by this Court and the Appellate Division. See *Charney v. North Jersey Trading Corp.*, 587 N.Y.S.2d 144 (1<sup>st</sup> Dept. 1992) (affirming May 21, 1991, Order of this Court requiring defendants to answer complaint and denying motion to dismiss for lack of jurisdiction)<sup>8</sup>; *Matter of Herskowitz v. Hon. Harold J. Tompkins*, 184 A.D.2d 402, 585 N.Y.S.2d 386, 388 (1<sup>st</sup> Dept. 1992) (denying a collateral subject matter jurisdiction challenge to *Charney v. North Jersey Trading Corp.* and imposing sanctions

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<sup>8</sup> The Appellate Division affirmed Justice Tompkins’s May 21, 1991, order directing the defendants to answer the Complaint “for the reasons stated in [Justice Tompkins’s decision dated April 9, 1991.” *Id.* It dismissed an appeal from Justice Tompkins’s October 16, 1991, denial of their motion to dismiss on the grounds that it was a motion for reargument but further noted that, had it addressed the merits, it would have affirmed “for the reasons stated by Justice Tompkins in his October 2, 1991 decision.” *Id.* Both the April 19 and October 2 decisions denied motions to dismiss based on jurisdiction. See *Charney v. North Jersey Trading Corp.* 150 Misc.2d 849, 850, 578 N.Y.S.2D 100, 101 (Sup. Ct., N.Y. Cty. 1991) (also noting that an earlier challenge to the Court’s jurisdiction had been rejected by Justice Silbermann on May 8, 1990). To the extent that Herskowitz seeks to have this issue referred back to Justice Silbermann, see letter dated December 10, 2004, from Hon. Jacqueline Silbermann to Judith Herskowitz (Windels Aff. Ex. B) stating that, after not having been assigned to the case since 1990, Justice Silbermann has “no recollection of the facts and circumstances of the case such that a reference to me at this late date would be appropriate”).

on Herskowitz (and her sons) in the form of a \$5,000 attorneys' fees award plus costs).

In twice holding that Herskowitz did not offer any valid legal reason why the Court should not have directed distribution of the fund, the Court has already rejected Herskowitz's arguments that the proposed distribution is preempted under the federal bankruptcy laws, that the Receiver is not acting as a receiver under the Business Corporation Law, and that the satisfaction of judgment issued in favor of [redacted] and [redacted]. Herskowitz should operate as a full satisfaction of the judgment against her. The Receiver and Charney respectfully refer the Court to the legal authorities that they have already cited in opposition to those arguments as dispositive. *See generally*, Reply Memorandum of plaintiff dated Oct. 14, 2003, in support of distribution of funds held by Receiver and in opposition to Herskowitz cross-motions; Reply Affirmation of Steven Delibert dated October 14, 2003; Reply Affirmation of Paul Windels III dated October 14, 2003; Memorandum of Plaintiff and Receiver dated June 15, 2004, in opposition to application to vacate order of April 13, 2004.<sup>9</sup>

Finally, Herskowitz's contention that the Receiver and Charney have somehow committed a fraud by not characterizing facts or interpreting documents and judicial proceedings as Herskowitz would falls of its own weight. Herskowitz has characterized those matters as she sees them throughout these proceedings, and the Court has been free to determine whether it accepts Herskowitz's renditions or not.

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<sup>9</sup> To the extent that Herskowitz argues that the distribution would violate federal bankruptcy law, it is worth noting that, although Herskowitz has known of the application for distribution since June 2003 -- eighteen months ago -- the Bankruptcy Court has taken no action to reopen the bankruptcy proceedings or take any action to prevent the distribution.

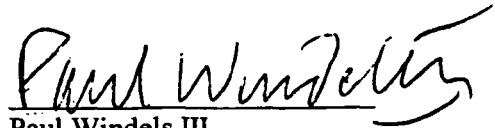
CONCLUSION

For the reasons set forth above, the motion to vacate should be denied, together with such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
December 13, 2004

Respectfully Submitted,

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