

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,
[REDACTED]

Defendants.
----- X

IAS PART 30
HEITLER, J.

Index No. 24517/88

MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO VACATE AND RENEW AND REARGUE
AND FOR "RESTITUTION"

Paul Windels III, a Receiver pursuant to Order of this Court dated May 21, 1991, respectfully submits this Memorandum of Law in opposition to the motion of defendant Judith Herskowitz to renew and reargue her motion to vacate the Order of this Court dated June 8, 2005, and to renew and reargue the various motions Herskowitz had previously filed which were decided by that Order. Those motions sought among other things to reargue yet again the determination that this Court has jurisdiction over Herskowitz in this matter and to disqualify Hon. Sherry Klein Heitler, the Justice of the Supreme Court currently assigned to this case, from this case, which motion was denied by Order dated February 16, 2005, and for "restitution" of funds distributed by the Receiver pursuant to Final Orders of this Court that have been entered and from which no appeal has been taken.

Herskowitz again has failed 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). 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 (1st 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 (1st 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 party seeking leave to renew and a valid excuse must be offered for not supplying such facts”). Here, 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).

In fact, Herskowitz disregards the two decisions of the Appellate Division affirming jurisdiction over the case and personal jurisdiction over her in purporting to press her jurisdictional arguments yet again. *See Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dept. 1992) (affirming May 21, 1991, Order of this Court requiring

defendants to answer complaint and denying motion to dismiss for lack of jurisdiction)¹; *Matter of Herskowitz v. Hon. Harold J. Tompkins*, 184 A.D.2d 402, 585 N.Y.S.2d 386, 388 (1st Dept. 1992) (denying a collateral subject matter jurisdiction challenge to *Charney v. North Jersey Trading Corp.* and imposing sanctions on Herskowitz (and her sons) in the form of a \$5,000 attorneys' fees award plus costs). Indeed, as this Court (Tompkins, J.) observed in denying one of Herskowitz's prior motions for reargument of the jurisdictional argument in this case, "there is no legitimate basis for four rearguments on one issue." *Charney v. North Jersey Trading Corp.*, 150 Misc.2d 849, 850, 578 N.Y.S.2d 100 (Sup. Ct., N.Y. Cty. 1991). Similarly, Herskowitz's argument that the settlement between Charney and the Receiver and defendants ~~XXXXXXXXXXXX~~ Herskowitz extinguishes the judgment entered against her was presented to the Court (*see* Memorandum No. 4 of Herskowitz dated October 1, 2003, Affidavit of Judith Herskowitz dated May 20, 2004, ¶ 28, Reply Memorandum of Susan Charney in Support of Proposed Distribution dated October 14, 2003, at 2-3) and rejected in the Court's decisions of April 13 and October 12, 2004.²

¹ 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 Silberman on May 8, 1990).

² 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 -- over two years ago -- the Bankruptcy Court has taken no action to reopen the bankruptcy proceedings or take any action to prevent the distribution. Herskowitz

Herskowitz's purported motion for "restitution" asks this Court in effect to reverse its decisions of April 13, 2004, directing the distribution of the funds held by the Receiver on Herskowitz's default and of October 12, 2004, denying Herskowitz's motion to vacate that default. Although Herskowitz has moved to renew and reargue the October 12 decision, she has not appealed that decision -- which is a Final Order -- notwithstanding that Notice of Entry of that decision was served on her on December 13, 2004. Affirmation of Paul Windels III dated March 31, 2005, and submitted in opposition to Herskowitz's motion to vacate the Court's February 16, 2005, decision denying her motion for recusal ("Windels Aff."), ¶¶ 2-3, Ex. A. Herskowitz's time to appeal has long passed, the appellate Courts are without jurisdiction to hear any appeal from that Decision and Order, and that Decision and Order is now *res judicata*. N.Y.C.P.L.R. § 5513(a) ("An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry"); *see, Haverstraw Park v. Runcible Properties Corp.*, 33 N.Y.2d 637, 347 N.Y.S.2d 585, 301 N.E.2d 553 (1973) (30-day period to appeal cannot be extended by stipulation); *Ibeweh v. State*, 259 A.D.2d 397, 687 N.Y.S.2d 113 (1st Dept. 1999) (dismissing notice of appeal served 35 days after service of notice of entry); *cf., Reynolds v. Dustman*, 1 N.Y.3D 559, 772 N.Y.S.2d 247, 804 N.E.2d 411 (2003) (notice of entry is required to start running of 30-day period to appeal). Moreover, the April 13, 2004, Order directing the Receiver to make the distribution has been in effect without stay for over a year; indeed, Herskowitz does not appear to have asked for

previously made this argument in opposition to the motion for distribution. It should be noted that the Bankruptcy Court dismissed the bankruptcy proceeding on the ground that the assets of North Jersey exceeded its liabilities and thus, in directing that the surplus be sent to the receiver, did not retain jurisdiction over the matter. *See* Affirmation of Steven Delibert dated May 28, 2003, in support of the proposed distribution Ex. D..

a stay of that Order at any time until the present.

With respect to the motion to vacate the Court's February 16 decision denying Herskowitz's motion for recusal, the Receiver respectfully refers the Court to the arguments set forth in the Memoranda of Law dated October 13, 2004, and December 22, 2004, in opposition to the original motion and to the supporting Affirmation of Paul Windels III dated October 13, 2004, and Affidavit of Eric Christu sworn to October 13, 2004, in opposition to the original motion, as well as to the Court's February 16, 2005, decision. The Receiver further notes that Herskowitz's present motion adds nothing to her original motion, itself apparently the tenth recusal motion she has made in the course of this litigation. She bases yet another motion on her disagreement with this Court's October 12, 2004, decision denying Herskowitz's motion to vacate her default in opposing the distribution of funds in the possession of the Receiver.³ That Herskowitz may disagree with the Court's decision does not warrant recusal in the Court's discretion. *See Burdick v. Shearson American Express, Inc.*, 160 A.D.2d 642, 559 N.Y.S.2d 908⁵⁰⁶ (1st Dept.), *leave to app. denied*, 76 N.Y.2d 706, 560 N.Y.S.2d 988 (1990) (affirming denial of recusal motion based on out of court statements by judge to attorneys under discretion standard); *Conti v. Citrin*, 239 A.D.2d 251, 657 N.Y.S.2d 678 (1st Dept. 1997) (affirming denial of recusal motion as within trial court's discretion where judge witnessed alleged assault that was subject of separate action between parties); *People v. Grier*, 273 A.D.2d 403, 709 N.Y.S.2d 607 (2d Dept. 2000) (affirming denial of recusal motion as within discretion of trial court). This is not a case

³ Notice of Entry of that decision, which was contained in a Final Order, was served on Herskowitz on December 13, 2004. Herskowitz has not served or filed a notice of appeal from that decision. Affirmation of Paul Windels III dated March 31, 2005 ("Windels Aff."), ¶¶ 2-3, Ex. A.

where the Court has so disregarded facts or law as to raise a question about its impartiality; it is a case where Herskowitz has persisted in disregarding decision after decision of this and every other Court she appears in. Indeed, the very making of this repetitive motion justifies the Court's imposition of sanctions against Herskowitz as an exercise of the Court's inherent power to impose order on proceedings before it. *See* Decision and Order dated June 8, 2005, at 10-11.

The Receiver will not burden the Court with a repetition of his arguments that the Court's June 8, 2005, decision and its underlying decisions of April 13, 2004, October 12, 2004, and February 16, 2005, were correct on the merits of the case. Those arguments are set forth in the Receiver's December 13, 2004, Memorandum of Law in opposition to Herskowitz's motion to vacate that decision and the papers in support of the May 29, 2003, application for distribution of funds held by the Receiver, and the Receiver respectfully refers the Court to that Memorandum of Law, as well as to the papers submitted in opposition to Herskowitz's original application to vacate her default.⁴

⁴ *See generally* Memoranda of Law dated March 31, 2005, December 22, 2004, December 13, 2004, October 21, 2004, October 13, 2004, June 15, 2004, and May 28, 2003, and Affirmations of Steven Delibert dated May 28, 2003, and June 15, 2004, and Paul Windels III dated May 28, 2003, and June 15, 2004.

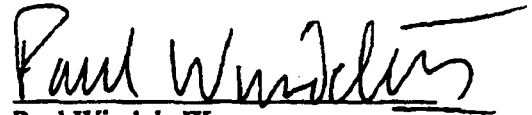
CONCLUSION

For the reasons set forth above and in the Receiver's memoranda dated March 31, 2005, December 22, 2004, December 13, 2004, October 21, 2004, October 13, 2004, June 15, 2004, and May 28, 2003, the motion to vacate and renew and reargue and for restitution should be denied, together with such other and further relief as the Court may deem just and proper.

**Dated: New York, New York
August 24, 2005**

Respectfully Submitted,

PERRY & WINDELS



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