

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,
██████████, and ██████████,

Defendants.
----- x

IAS PART 30
HEITLER, J.

REPLY AFFIRMATION IN
FURTHER SUPPORT OF
PROPOSED DISTRIBUTION OF FUNDS AND
OF MOTION FOR
PROTECTIVE ORDER
AND IN OPPOSITION TO
CROSS-MOTIONS FOR
STAY AND OTHER
RELIEF

PAUL WINDELS III, an attorney duly admitted to practice before this Court, affirms,
pursuant to CPLR Rule 2106:

1. I am a member of the Bar of this Court and of the firm of Perry & Windels and am receiver of the assets of North Jersey Trading Corporation ("North Jersey"), pursuant to this Court's order of May 21, 1991. I submit this Reply Affirmation: (a) in further support of the proposed distribution of \$683,531.90 (the "Proposed Distribution") presently held by me as set forth in my Affirmation dated May 28, 2003;¹ (b) in further support of my motion for a protective order as requested in my Affirmation dated July 15, 2003; and (c) in opposition to the cross-motions of defendant Judith Herskowitz for a stay, to reopen judgments that were litigated and decided nearly ten years ago, for referral to the Administrative Judge, and to compel production of documents.

2. Ms. Herskowitz utterly fails to refute the chief arguments made in support of the

¹ At the time of the motion, I was holding \$682,225.89. The difference reflects accrued interest. See paragraph 15 below.

Proposed Distribution, to wit:

- a. That the Proposed Distribution is of proceeds obtained as a result of a derivative action brought on behalf of North Jersey;
- b. That those proceeds were obtained through the efforts of counsel for the derivative plaintiff, as well as the undersigned;
- c. That counsel was required to spend extraordinary amounts of additional time on this matter because of the vexatious, dilatory, and frivolous conduct of Ms. Herskowitz;
- d. That the Proposed Distribution does not compensate counsel fully for their time spent on this matter;
- e. That all parties in interest with the exception of Ms. Herskowitz have consented to (or not objected to) the Proposed Distribution;
- f. That Ms. Herskowitz's conduct throughout these proceedings, as evidenced by the trail of sanctions and contempt citations entered against her, bars her from opposing the Proposed Distribution under the doctrine of unclean hands.

See, generally, Affirmations of Paul Windels III and Steven Delibert both dated May 28, 2003 (respectively "Windels 5/28 Aff." and "Delibert 5/28 Aff.") and Memorandum of Law dated May 28, 2003 ("5/28 Memo."), all submitted in support of the Proposed Distribution. Accordingly, and for the reasons set forth in the 5/28 Memo., the Court should direct me to effect the Proposed Distribution.

3. Being unable to refute these facts, Ms. Herskowitz resorts to a series of false accusations against me and nearly every other participant in these proceedings (as well as those

in other jurisdictions), echoing her history of such behavior in the past. *See* Delibert 5/28 Aff. ¶¶ 14-25. Contrary to those outrageous accusations, I have at no time conspired to defraud the United States Bankruptcy Court for the District of New Jersey or anyone else for that matter. The record makes plain that what Ms. Herskowitz would characterize as larceny or bankruptcy fraud is in fact the making of an application to this Court on notice to all parties for an Order distributing all proceeds that I have received, exactly what I am required to do as receiver.

4. Annexed hereto as Exhibit A is a copy of my Affirmation dated December 13, 1999, which I submitted to the United States bankruptcy Court for the District of New Jersey in In re North Jersey Trading Corp., Case No. 93-31620 SAS (Chapter 11). In that Affirmation, I undertook as follows at paragraph 4 of that Affirmation:

As directed by [the] Orders [of the Supreme Court of the State of New York appointing me receiver in these proceedings], I shall hold all funds that come into my possession as receiver in an interest-bearing or checking account with the bank of New York in New York, New York, and shall disburse no funds except upon and pursuant to an order of the Supreme Court [of the State of New York].”

5. As I undertook in that Affirmation, I have not disbursed any funds I have received from the Bankruptcy Court in In re North Jersey Trading Corp. to date. Nor have I made any agreement to do so.

6. What I have done is to join a motion, made upon consent of (or without objection by) all known parties in interest except for defendant Judith Herskowitz, to request this Court to direct a distribution – the Proposed Distribution -- of the funds I am presently holding as receiver. *See generally* Windels 5/28 Aff. Seeking an Order of this Court to distribute those funds is exactly what I undertook to do before the Bankruptcy Court. That motion has been served upon all parties to this action, together with the former trustee in bankruptcy appointed by

the Bankruptcy Court in In re North Jersey Trading Corp. I am aware of no objection to the Proposed Distribution other than by Judith Herskowitz.

7. My appearance in this action, as well as in the related action Charney v. Friedlander, Index No. 113775/95 (Sup. Ct., N.Y. Cty.) (the “Turnover Proceeding”), has at all times been as receiver of the assets of North Jersey Trading Corporation. Although Susan Charney is listed as plaintiff on both captions, she has appeared as plaintiff derivatively on behalf of North Jersey. Delibert 5/28 Aff. ¶¶ 12, 25-29; *See also* my oath and bond, a copy of which is annexed to my December 13, 1999, Affirmation (Exhibit A hereto) as Exhibit C. Ms. Charney commenced the Turnover Proceeding to enforce the judgment she had obtained in this action as derivative plaintiff on behalf of North Jersey. Delibert 5/28 Aff. ¶¶ 25-29; Moreover, the entire proceeds of the settlement of the Turnover Proceeding were paid into the estate in bankruptcy of North Jersey, not to Ms. Charney individually, and thence to me by the trustee in bankruptcy. *See* Delibert 5/28 Aff. ¶ 29, Ex. D, F, & H.

8. As a separate matter, I draw the Court’s attention to the fact that my appointment in the Turnover Proceeding expressly authorized that my powers “are expressly continued, notwithstanding the entry of final judgment in said action, until further Order of this Court and he shall have all of the usual powers and duties of a permanent receiver” Order entered in this action and the Turnover Proceeding Nov. 24, 1995 (copy annexed to December 13, 1999, Affirmation (Exhibit A hereto) as Exhibit B), at 3-4.

9. Moreover, Ms. Herskowitz’s continuing history of utter disregard for the authority of this Court or for any rule of practice demonstrate the inappropriateness of any stay of these proceedings at her behest. While seeking adjournments in the matters pending before this Court,

Ms. Herskowitz has demonstrated a willingness to try to litigate matters pending before this Court in other jurisdictions. After I moved for a protective order, and while Ms. Herskowitz was aware that I was in China for the purpose of adopting a child (*see* my July 15, 2003, Affirmation dated July 15, 2003 (“Windels 7/15 Aff.”) ¶ 10, Ex. D), she served a purported subpoena on the Bank of New York which is holding the funds to be distributed (the “Distribution Fund”) using the captions of actions in Florida which I understand to have been closed. *See* Reply Affidavit of Eric Christu sworn to September 17, 2003. The purported subpoena was apparently sent to Mr. Cristu, who is counsel of record in those proceedings, stapled inside another document. *See* Christu Reply Affidavit ¶ 8, Ex. A.

10. Indeed, by Order dated September 23, 2003, the Circuit Court for Dade County, Florida, found that “the Court has reviewed a sufficient amount of the file and determined that [Judith] Herskowitz is raising issues which have already been determined by this Court . . . and appealed to and affirmed by the Third District Court of Appeal.” *See* Reply Affirmation of Steven Delibert dated October 14, 2003 (“Delibert Reply Aff.”), Ex. B ¶2. The Circuit Court accordingly directed that “all pending motions or applications for relief of any kind filed by [Judith] Herskowitz are hereby stricken, the case is closed [except for enforcement of judgments against Ms. Herskowitz].” Delibert Reply Aff. Ex. B ¶ 4.

11. Although the Dade County Circuit Court further ruled that “[Judith] Herskowitz is hereby directed and ordered not to file any further pleadings in the above-captioned cases without first obtaining leave of this Court,” Delibert Reply Aff. Ex. B ¶ 3, I understand that Ms. Herskowitz has continued to file purported papers in those proceedings notwithstanding that Order. *See* Delibert Reply Aff. ¶ 9(N).

12. Moreover, Ms. Herskowitz has apparently engaged in the practice of communicating with this Court by telecopy while copying opposing counsel by mail (and in an untimely fashion). I have learned that, on September 12, 2003, Ms. Herskowitz made an application to the Court for an adjournment of these motions, which application was denied by letter dated September 12, 2003, a copy of which is annexed hereto as Exhibit B. Although Ms. Herskowitz apparently made that application by letter faxed to the Court on September 12, 2003 (a copy of which is annexed hereto as Exhibit C), and although I am listed as having been copied on that letter, I did not receive a copy of that letter from her until September 17, when it arrived in the mail. Ms. Herskowitz has my fax number, which I personally gave her in June 2003, and, when she has considered it in her interest, she has faxed documents to me. *See* Windels 7/15 Aff. Ex. A.

13. Not only has Ms. Herskowitz engaged in the practice of sending letters to the Court by fax with copies to other counsel by regular mail (apparently in an unethical attempt to communicate *ex parte* with the Court), she appears not even to have mailed copies to counsel in a timely fashion. Annexed hereto as Exhibit D is a copy of the envelope in which Ms. Herskowitz's letter reached me, which bears a postmark of September 15, 2003, PM. I can only conclude that Ms. Herskowitz, after contacting the Court by fax on September 12, waited until September 15 to mail me a copy of that letter, with the result that I received it five days after it reached the Court.

14. Simply put, Ms. Herskowitz should not be granted a stay in this action from this Court while she seeks to make an end run around these proceedings in other jurisdictions and acts in disregard of all basic rules of fair practice and any court order that is not to her liking.

15. Since the date of the original application for the Proposed Distribution, interest has continued to accrue on the Distribution Fund, which contains \$683,531.90 as of September 30, 2003. Interest will continue to accrue until the Proposed Distribution is effected. I therefore respectfully request that any such additional interest be paid to Steven Delibert, Esq., as additional counsel fees, in that the fees he would be paid under the Proposed Distribution are far below his billable time to the case. *See Delibert 5/28 Aff. ¶¶ 42-48.*

16. Finally, with respect to my motion for a protective order, Ms. Herskowitz does not even respond to the arguments made in support of that motion, specifically:

- a. That she is not entitled to take discovery for an improper purpose;
- b. That, a party who has defaulted cannot seek discovery;
- c. That, as a judgment debtor, she is not entitled to post-judgment discovery at all;
and
- d. That her conduct throughout these proceedings, as evidenced by the trail of sanctions and contempt citations entered against her, bars her from obtaining discovery under the doctrine of unclean hands.

See my Memorandum of Law dated July 15, 2003, at 4-6 and Windels 7/15 Aff. ¶¶ 3-11.

Accordingly, and for the reasons set forth in that Memorandum, the Court should enter a Protective Order striking all of Ms. Herskowitz's purported discovery demands addressed to me.

17. I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
October 14, 2003


PAUL WINDELS III