SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

ARKIN KAPLAN RICE LLP, STANLEY S. ARKIN, and LISA C. SOLBAKKEN,

Plaintiffs,

Index No.: 652316/2012

-against-

Mot. Seq. No. 028

HOWARD J. KAPLAN, MICHELLE A. RICE, and KAPLAN RICE LLP,

Defendants,

-and-

ARKIN KAPLAN RICE LLP, a dissolved firm,

Nominal Defendant.

ANDREA MASLEY, J.S.C.:

Pursuant to a decision and order dated April 26, 2016, the court referred "consideration and determination of the parties' respective objections . . . to the final accounting . . . to a Special Referee . . . to hear and report . . . [on] the merits of the objections and whether the final accounting should be confirmed, modified or rejected" (NYSCEF Doc. No. 1444, memorandum decision and order dated Apr. 26, 2016 at 20). Hearings were held on the matter before Special Referee Jeffrey A. Helewitz on February 14-16, 27, and May, 8, 2017. On May 26, 2017, the Referee issued a report and recommendation (NYSCEF Doc. No. 1642, referee's report dated May, 26, 2017) (Referee's report), which was later amended by so-ordered stipulation dated June 13, 2017 (NYSCEF Doc. No. 1644, so-ordered stipulation dated June 13, 2017). The Referee's recommendation was that the final accounting should be modified in certain respects; that the final accounting itself should not be confirmed in total, as there were many areas where the record was insufficient to substantiate certain issues; and that further hearings should be held as to those issues.

Plaintiffs Arkin Kaplan Rice LLP (AKR), Stanley S. Arkin, and Lisa C. Solbakken now move, pursuant to CPLR 4403 and 22 NYCRR § 202.44 (a), to reject the Referee's report. Defendants Howard J. Kaplan, Michelle A. Rice, and Kaplan Rice LLP (Kaplan Rice) cross-

move, pursuant to CPLR 4403 and 22 NYCRR § 202.44 (a), to confirm the Referee's report with certain modifications and to direct plaintiffs to pay AKR the sums set forth in the report. The court presumes familiarity with the background facts and circumstances in this action (*see Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 422 [1st Dept 2014]; *Arkin Kaplan Rice LLP v Kaplan*, 2016 NY Slip Op 30845[U] [Sup Ct, NY County 2016]; *see also Arkin Kaplan Rice LLP v Kaplan,* 138 AD3d 415 [1st Dept 2016]; *Arkin Kaplan Rice LLP v Kaplan,* 120 AD3d 427, 428 [1st Dept 2014]), and refers to the Referee's report for all relevant facts (NYSCEF Doc. Nos. 1642, 1644).

Discussion

CPLR 4403 provides that the court may "confirm or reject, in whole or in part, . . . the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing." 22 NYCRR 202.44 provides for the timing of a motion to confirm or reject the report.

> "Generally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor"

(*Poster v Poster*, 4 AD3d 145, 145 [1st Dept 2004], *lv denied* 3 NY3d 605 [2004]). Where the referee has "clearly defined the issues, resolved matters of credibility, and made findings substantially supported by the record," the court should confirm the report (*Rosenbloom v Gurary*, 59 AD3d 274, 274 [1st Dept 2009] [internal citation omitted]). The referee's credibility judgments, in particular, "are entitled to great weight" (*Matter of Woods v Garcia*, 147 AD3d 665, 665 [1st Dept 2017] [internal citation omitted]).

The Referee's report in this matter exhaustively examined the figures set forth in the final accounting report of Mitchell & Titus LLP (M&T), the independent accountant appointed by the

court in this action, and made findings with respect to whether such numbers were substantiated by the extensive testimonial and documentary record (Referee's report at 17-35). The Referee then considered and made detailed findings as to the parties' objections to the final accounting report (*id.* at 35-39) and the parties' post-hearing memoranda (*id.* at 39-44). Ultimately, the Referee recommended that certain modifications be made to the final accounting report in order to reconcile the report with his findings (*id.* at 44-47), but recommended that the final accounting report, as a whole, not be confirmed due to outstanding factual issues that were not sufficiently substantiated by the record evidence (*id.* at 47-50). Specifically, the record did not substantiate whether there was an agreement between the partners of AKR on the allocation of profits for the year 2012 and the subsequent wind-up period; which party or parties were the proper owners of certain artwork acquired for AKR by Arkin and reimbursed to some extent by AKR; whether "any retained earnings are available for distribution;" whether any capital contributions were made to the partnership; and, which payable accounts of AKR relate to corporate relocation services (*id.*). The Referee's report was amended on June 13, 2017, to accommodate a further stipulation of the parties as to certain assets and liabilities contained in the final accounting report (NYSCEF Doc. No. 1644, so-ordered stipulation).

I. Plaintiffs' Motion to Reject the Report

Plaintiffs now move to reject the Referee's report on two grounds. First, plaintiffs argue that the Referee exceeded the scope of the reference when he found that post-dissolution rent payments should be returned to AKR. Such determination, plaintiffs assert, is contrary to the law of the case, violates the Partnership Law and the Debtor and Creditor Law, and, in any event, does not account for amounts already reimbursed or returned to the firm. Second, plaintiffs claim that the Referee made findings of fact and credibility that are not substantiated

by the record, or that he failed to take into account evidence in the record, in several respects. The court will address each alleged improper finding in turn below.

In opposition, defendants argue that reimbursement of post-dissolution rent payments was within the scope of the reference. In this regard, defendants assert that the issue of whether post-dissolution rent could be deducted from their share of AKR's assets was covered by the final accounting report and their objections thereto. Further, defendants state that the prior decisions issued in this matter compel the result reached by the Referee. Finally, defendants claim that the Referee's findings were all adequately supported by the record.

The Referee's recommendation that roughly $1.4 million must be repaid to AKR's account pursuant to prior court orders in this action (Referee's report at 43) must be modified in part. The court agrees with the Referee's finding that Arkin is to pay $884,351.47 into AKR's account to reimburse funds taken pursuant to a letter of credit issued to AKR's landlord as security for the sublease. On April 26, 2016, the court (Oing, J.), decided motion sequence nos. 19 and 21. On motion sequence no. 19, the court denied plaintiffs' motion to vacate the court's (Sherwood, J.) Dec. 3, 2012 order that Arkin return $513,147.16 to AKR's account, including $489,299.20 that was used to pay rent for AKR's premises (*Arkin Kaplan Rice LLP*, 2016 NY Slip Op 30845[U] at **2, **11). Specifically, the court stated that this issue would be resolved during the accounting (id. at **9). On motion sequence no. 21, the court denied defendants' motion, pursuant to Partnership Law § 43, to compel Arkin to pay $884,351.47 into AKR's account (*id.* at **2, **19). However, the Appellate Division, First Department, made it very clear in its April 5, 2016 decision that Kaplan and Rice "were not liable for any post-dissolution liabilities, including as partners of AKR, under the specific language of the sublease at issue" (*Arkin Kaplan Rice LLP v Kaplan,* 138 AD3d at 415). Thus, in light of the First Department's

decision, this court accepts the Referee's recommendation. Arkin is to reimburse $884,351.47 to AKR as Kaplan and Rice, individually and as partners, are not liable for any post-dissolution rent obligations.

With respect to the $489,299.20 of the rent allocation, plaintiffs were originally ordered to reimburse these funds to AKR's account by the court's (Sherwood, J.) December 3, 2012 order (NYSCEF Doc. No. 93, order dated Dec. 3, 2012), which held that paying rent with AKR funds violated the court's prior orders. That order was subsequently affirmed by the Appellate Division, First Department (*Arkin Kaplan Rice LLP,* 120 AD3d at 428 [1st Dept 2014]). Plaintiffs argue that requiring reimbursement of rent expenses would effectively allow Kaplan and Rice to withdraw assets from the partnership account before AKR's creditors are paid, which plaintiffs assert violates Partnership Law §§ 52[1] and 71[2], and Debtor and Creditor Law § 277 (a).[3] Plaintiffs' argument, however, has already been rejected by the court (Oing, J.) and the Appellate Division, First Department (*Arkin Kaplan Rice LLP*, 120 AD3d at 426; tr dated Jan. 23, 2015 at 23-43).

Plaintiffs' remaining argument, however, has merit. Plaintiffs argue that the $489,299.20, and, indeed, the entirety of the $513,147.16 ordered to be returned, has been returned to AKR's account. Specifically, plaintiffs assert that $311,902 was reimbursed to AKR

[1] "A partner's interest in the partnership is his share of the profits and surplus and the same is personal property" (Partnership Law § 52).

[2] "The liabilities of the partnership shall rank in order of payment, as follows: I. Those owing to creditors other than partners, II. Those owing to partners other than for capital and profits, III. Those owing to partners in respect of capital, IV. Those owing to partners in respect of profits" (Partnership Law § 71 [b]).

[3] "Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred, a. To a partner, whether with or without a promise by him to pay partnership debts" (Debtor and Creditor Law § 277 [a]).

from subtenants, and for legal services provided by AKR (final accounting report at 14). Plaintiffs also state that Arkin deposited the remaining $201,245.69 into the account himself (tr dated Fe. 16, 2017 at 377:6-12). The Referee did not address, and defendants do not challenge, that $311,902 was returned to the AKR account. Defendants also do not challenge Arkin's deposit of $201,245.69 into AKR's account, which the documentary evidence shows was to satisfy the court's December 3, 2012 order (sub-account application). Thus, these combined funds must also be deemed to have been returned. Plaintiffs' contention that Arkin should be able to withdraw these funds is unsupported by the record or citation to legal authority.

Accordingly, the Referee's report shall be modified to delete the requirement that rent expenses of $513,147.16 must be reimbursed to AKR's account (Referee's report at 32-33, 36, 43).

Plaintiffs challenge the Referee's alleged failure to credit the capital account balances set forth in AKR's financial statements and Schedule K-1's for 2012 through 2015. Plaintiffs argue that defendants acquiesced to the capital account balances set forth therein by failing to challenge them, and by filing tax returns based on this information. The record, however, supports the Referee's recommendation that the capital account balances were not adequately substantiated and should not be included in the final accounting report without further hearing. Specifically, the Referee found that, based on the record, there was no written partnership agreement (Referee's report at 15); that the partners came to no informal decision as to allocation of profits (*id.*); and that any profits in the form of retained earnings must be considered part of the total equity of the firm, to be distributed pending a determination of the proper allocations to the former partners (*id.* at 19-20). The Referee found that ownership percentages as expressed in the Schedule K-1's for 2009 to 2011 varied from year to year (*id.* at

20-21). Moreover, the ownership percentages for the years following AKR's dissolution "var[ied] dramatically from the previous years, which should not happen in a winding up proceeding" (*id.* at 21-22). In this regard, Levine, AKR's accountant, testified that he allocated partnership profits year to year based on Arkin's sole determination (*id.* at 19; tr dated Feb. 15, 2017 at 182:6-183:4). It should be noted that the Referee found that Levine and M&T provided vastly different balances for AKR's equity account as of May 17, 2012 (Referee's report at 22). Accordingly, the Referee's finding, that further evidence was necessary to substantiate the ownership percentages and profit allocations for AKR during the wind up period, is supported by the record and will not be disturbed (*Poster*, 4 AD3d at 145).

Plaintiffs challenge the Referee's findings of bias by Levine and Collins, AKR's bookkeeper and office manager. These findings are, contrary to plaintiffs' argument, supported by the record. The Referee noted that Collins "implied that Kaplan and Rice were ungrateful for what Arkin did for them and her emails indicated a degree of hostility against defendants" (Referee's report at 18-19). As to Levine, he determined partnership distributions based upon what he was told by Arkin (Referee's report at 9, 19). Moreover, he testified that he assumed that Arkin owned the entirety of AKR's equity because he "didn't know anything to the contrary" (tr dated Feb. 15, 2017 at 182:25-183:4). In addition, he had served as Arkin's accountant for "decades" (Referee's report at 19). These findings are entitled to "great weight" and will not be disturbed (*Matter of Woods*, 147 AD3d at 665).[4]

In addition to serving as bookkeeper and office manager, Collins also had several duties and responsibilities related to the wind up process for AKR, and M&T allocated the costs of her wind up work to AKR (Referee's report at 34). Plaintiffs challenge the Referee's determination

[4] Plaintiffs also claim that the Referee found that Hurok, an independent accountant with Citrin Cooperman & Co., LLC (Citrin), retained to prepare AKR's tax returns for 2012 through 2015, was biased in favor of plaintiffs. The court finds the report silent as to such a finding.

that AKR was not required to reimburse their firm, Arkin Solbakken, for Collins's salary, because Collins could not substantiate the amount of time she spent on tasks related to the wind up (*id.*). As the Referee found, Collins could only estimate her time and plaintiffs provided no other substantiating evidence; the Referee did not find Collins' testimony to be credible (*id.* at 34, 43; tr dated Feb. 27, 2017 at 490:5-493:7). It should be noted that the final accounting report also states that Collins' time spent on wind up matters could not be substantiated and was "not based on any contemporaneous reporting of time and effort" (M&T final accounting report at 17). In a similar context, and as the Referee correctly found, courts reviewing requests for attorney's fees have reduced or refused to award fees where the party seeking them has not provided contemporaneous time records or other evidence substantiating them (*see Carroll Air Servs. v Northland Aviation*, 225 AD2d 870, 872 [3d Dept 1996], *lv dismissed in part and denied in part* 88 NY2d 1061 [1996]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991] ["We have also repeatedly emphasized the significance of contemporaneously-maintained time records as a component of an attorneys' affirmation of legal services, and have given little weight to after the fact estimations of time expended"] [internal quotation marks and citations omitted]). Accordingly, the Referee's finding, that Arkin Solbakken was not entitled to reimbursement from AKR for Collins' work on wind up matters, is supported by the record and will not be disturbed (*Poster*, 4 AD3d at 145).

Plaintiffs challenge the Referee's determination that defendants would not be responsible for the expense related to Hurok's tax preparation services. Plaintiffs argue that Arkin, as wind up partner, had the sole authority to retain and then direct Hurok's work on behalf of AKR. However, as the Referee found, defendants repeatedly made inquiries regarding the tax returns that Hurok ignored, leading to defendants filing objections to the returns with the Internal

Revenue Service (IRS) (Referee's report at 29-30; NYSCEF Doc. No. 1675, plaintiffs' hearing exhibit 29, letter dated Sep. 16, 2016 from Allegaert to court). Moreover, Hurok testified that he did not audit AKR's books and records in preparing the returns, but instead took the information he was provided at face value (tr dated Feb. 16, 2017 at 276:20-277:7). While plaintiffs are correct that defendants had no authority to bind AKR after they left the firm (Partnership Law § 66 [3] [c]), the Referee correctly found that Kaplan and Rice objected to the tax returns, and that Hurok accepted allocations provided by AKR without qualification and, indeed, without responding to inquiries from Kaplan and Rice (Referee's report at 30). Further, the Referee found, as set forth above, that such allocations were not adequately supported by the record. Accordingly, the Referee's finding, that Kaplan and Rice are not responsible for Hurok's fees and that, therefore, such fees are not a liability of AKR, is supported by the record and will not be disturbed (*Poster*, 4 AD3d at 145).

Next, plaintiffs challenge the Referee's finding that Arkin Solbakken bears the cost of client file storage subsequent to August 31, 2012 (Referee's report at 28-29). Plaintiffs argue that, while both Kaplan Rice and Arkin Solbakken removed files from storage after AKR dissolved, the remaining files in storage all belonged to AKR, and should, therefore, be an AKR expense. Moreover, plaintiffs claim that defendants should be liable for the storage fees because they delayed in consenting to the destruction of the files, and refused to sign a hold harmless agreement in the storage company's favor. The Referee properly found, however, that there was no evidence that any of the remaining files in storage belonged to defendants, or were related to Kaplan Rice clients or matters (*id.*). Specifically, the Referee found that Arkin and Solbakken did not testify as to the contents of the storage unit, and that Collins, the only one of plaintiffs' witnesses who did, had no personal knowledge of the storage unit (*id.*). By contrast, both

Kaplan and Rice testified that all of their files had been removed from storage by August 31, 2012, and that defendants objected to any continuing storage charges (*id.* at 14-16). Accordingly, the Referee's finding, that Arkin Solbakken, not AKR, is responsible for storage charges after August 31, 2012, is supported by the record and will not be disturbed (*Poster*, 4 AD3d at 145).

Plaintiffs also challenge the Referee's finding that the rent bill for June and July 2012 should be adjusted, and Kaplan Rice and Arkin Solbakken are entitled to a credit, because Collins accidentally double counted the escalation payment for June 2012 (Referee's report at 13, 39, 45). In this regard, and contrary to plaintiffs' characterization, Collins testified that, while the tax escalation for June 2012 had been paid in December 2011, she had calculated tax escalations for both June and July 2012 in the rent bill paid in July 2012 (rent invoice dated July 5, 2012; tr dated Feb. 27, 2017 at 448:5-455:5; email dated July 15, 2012 from Collins to Kaplan and attachments). While plaintiffs argue that AKR never received a credit for the overpayment from the landlord, and, therefore, Kaplan Rice and Arkin Solbakken are not entitled to a credit, they do not explain why crediting the overpayment to the successor firms requires a credit back to AKR from the landlord. Accordingly, the Referee's adjustment of the entry for June and July 2012 rent is supported by the record and will not be disturbed (*Poster*, 4 AD3d at 145).

Plaintiffs next challenge the Referee's finding that certain payroll and operating costs that M&T allocated to Arkin Solbakken were not substantiated, and the Referee's recommendation that those costs be removed from the final accounting (Referee's report at 34, 42-43, 46-47). Plaintiffs argue that these costs were substantiated by the final accounting report itself, and, therefore, no evidence was necessary to substantiate them further at the hearing. However, a referee's finding that a claim has not been substantiated is entitled to deference (*e.g.*

Matter of Caughman v Turner, 282 AD2d 228, 228 [1st Dept 2001]).[5] Contrary to plaintiffs' argument, the final accounting report provides no explanation or supporting documentation for Arkin Solbakken's entitlement to these costs. The Referee noted that plaintiffs had likewise failed to substantiate the operating costs allegedly covered. Collins testified that AKR continued its own payroll until July 19, 2012, one day after all AKR employees were discharged (tr dated Feb. 16, 2017 at 359:23-360:7; exhibit 20, tr dated Feb. 27, 2017 at 431:18-433:2). Shawn Yakich, the accountant who prepared the final accounting report, testified that the amounts allegedly owed to and from AKR and its successor firms came from the parties, and that he did not see any of the underlying documentation (Referee's report at 35). Thus, the record does not contain a basis for any of these payroll or operating expenses allegedly paid by Arkin Solbakken, and the Referee's finding in this regard will not be disturbed (*Poster*, 4 AD3d at 145).

Finally, plaintiffs seek to modify the final report to reflect the parties' pre-hearing stipulation that all uncollected accounts receivable, rather than the $184,697 figure quoted in the report for uncollectable accounts receivable written off prior to the date of the report, should be "written off and deducted from AKR's total assets" (NYSCEF Doc. No. 1650, stipulation dated Feb. 10, 2017 at 2). Defendants also seek to modify the report in this respect. The Referee acknowledged the parties' stipulation in the report itself, though noted only those accounts receivable that had previously been written off as uncollectable in his modifications to the final accounting report (Referee's report at 2, 23, 44). Accordingly, page 44 of the Referee's report shall be modified to read "the parties agree that $705,188 of uncollected accounts receivable are to be written off," and the final accounting modified accordingly.

Accordingly, the court hereby grants plaintiffs' motion to reject the report in part, to the

[5] For the same reason, the court declines to disturb the Referee's finding that the allocation of costs for artwork displayed in AKR's offices was not adequately substantiated, and further hearings on that issue are necessary (Referee's report at 47, 49).

extent of modifying the Referee's report as indicated above, but otherwise denies the motion.

II. Defendants' Cross Motion to Modify, and, as Modified, Confirm the Report

Defendants cross-move to modify the report in certain respects, and to confirm the report as modified. Specifically, defendants seek to adjust the equity of AKR's members as of May 17, 2012, and to require additional hearings relating to fee arrangements with three of AKR's clients.[6] As set forth above, defendants also sought to modify the report to write off all uncollected accounts receivable as of the date of the final accounting report, which the court has already considered and granted.

With respect to AKR's members' equity as of May 17, 2012, defendants argue that, pursuant to a stipulation of the parties, $47,479 in client retainers were being deemed assets of AKR rather than liabilities, and the final accounting report should be modified accordingly. The court notes that the Referee has already amended his report to include this modification (NYSCEF Doc. No. 1644, order dated June 13, 2017 at 3, ¶ 1). Defendants also argue that capital account balances for 2012 must be considered as part of the members' equity pursuant to the Referee's statements during the hearing and findings in the Referee's report. The $358,627 figure quoted by defendants, however, is the members' equity as of January 1, 2012 (AKR financial statements for Jan. 1, 2012 – May 17, 2012 at 5). Thus, the Referee's findings with respect to the parties' lack of an agreement as to equity and profit allocation during the wind-up period does not impact the members' equity for January 1, 2012, prior to AKR's dissolution. As the Referee noted, any partnership allocations or distributions "are deemed to represent a part of the total [e]quity of the partnership until a determination has been made as to the percentage to

[6] Defendants also seek to confirm the Referee's recommendations related to rent reimbursement, storage charges, Citrin's tax preparation fees, the proper allocation of rent escalation payments as it relates to use and occupancy, and the need for further hearings relating to artwork displayed in AKR's offices. These issues have all been addressed in the court's discussion and ruling on plaintiffs' motion to reject the report.

which each partner is entitled" (Referee's report at 19). Thus, the capital account balances are already counted as part of the members' equity as of May 17, 2012, and the court declines to modify the Referee's report in this regard.

Defendants also argue that additional hearings should be held with respect to whether three of AKR's clients might owe AKR a premium or contingency fee. In this regard, the final accounting report states that, based on a review of the retainer agreements signed by those clients and interviews with plaintiffs, there was no indication that any such fee or premium was owed (final accounting report at 15). The Referee heard testimony from Collins that there was a premium amendment for one client, and might have been a contingency fee for another (tr dated 2/27/17 at 389:14-19, 392:7-398:5), but also that the first client was not required to pay the premium (*id.* at 472:6-18), and that the second client had paid all fees and expenses in full as of May 17, 2012 (*id.* at 473:21-23). Thus, while the Referee incorrectly found that there was no evidence that such fee arrangements existed (Referee's report at 42), neither the hearing record nor defendants' briefing suggests any evidence that such fees are outstanding. Moreover, even if such fees were owed to the firm, as set forth above, the parties have already stipulated to write off all uncollected accounts receivable, which would include such fees, if they were outstanding. Accordingly, the court declines to modify the Referee's report to require further hearings on this issue.

Having addressed defendants' proposed modifications, and having reviewed the Referee's report, the court finds that, except as set forth above, it is substantially supported by the record and should be confirmed (*Rosenbloom*, 59 AD3d at 274). Accordingly, defendants' motion to confirm the report as modified above is granted. The Referee's report and recommendation, specifically that the final accounting report be modified and confirmed in part,

and that further hearings should be held as to those issues set forth above, is hereby confirmed.

The court has considered the parties' remaining arguments, and finds them to be without merit.

Accordingly, it is hereby,

ORDERED that the motion of plaintiffs Arkin Kaplan Rice LLP, Stanley S. Arkin, and Lisa Solbakken, to reject the report of the Special Referee is granted in part, to the extent of modifying the Referee's report as set forth above, and otherwise denied; and it is further

ORDERED that the cross motion of defendants Howard J. Kaplan, Michelle A. Rice, and Kaplan Rice LLP to confirm the report of the Special Referee, as modified, is granted; and it is further

ORDERED that counsel are directed to appear for a hearing on the remaining issues of ownership percentages and profit allocations for AKR for the year 2012 and subsequent wind up period, artwork ownership, whether retained earnings are available for distribution, whether any capital contributions were made to AKR, and which payable accounts relate to corporation relocation services in Room 242, 60 Centre Street, on January 18, 2018, at 11 AM.

Dated: 12/20/17

ENTER:

HON. ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY