

Arkin Kaplan Rice LLP v Kaplan

2013 NY Slip Op 31780(U)

August 1, 2013

Sup Ct, New York County

Docket Number: 652316/2012

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

ARKIN KAPLAN RICE LLC, et al.,

Plaintiffs,

INDEX NO. 652316/2012

-against-

MOTION DATE _____

HOWARD KAPLAN, et al.,

MOTION SEQ. NO. 007

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

Dated: August 1, 2013


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

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

Plaintiffs,

-against-

**HOWARD KAPLAN, MICHELLE RICE and
KAPLAN RICE LLP,**

Defendants.

-----X
O. PETER SHERWOOD, J.S.C.:

**DECISION AND ORDER
Motion Seq. No.: 007**

Index No.: 652316/2012

I. APPOINTMENT OF AN INDEPENDENT ACCOUNTANT

Before the court is defendants' motion brought on by Order to Show Cause for the appointment of an independent accountant to: (1) administer the financial affairs of Arkin Kaplan Rice, LLP ("AKR"); (2) prepare the tax return information of each of AKR's former partners; and (3) conduct the final accounting of AKR. Defendants also ask that the professional fees for such an independent accountant be paid by AKR.

Defendants contend that such relief is necessary as the individual plaintiffs have violated this court's orders, misappropriated funds from AKR's bank account, placed their interests above AKR's, attempted to impose their personal liabilities on AKR, sought through "doctored" bank applications to obtain sole control over AKR's funds and are interested only in prolonging this litigation rather than resolving it. Defendants claim that through their actions, Arkin & Solbakken ("AS") have made clear that they have no intention of fulfilling their fiduciary duties to AKR and their former partners.

Defendants contend further that Arkin & Solbakken are aided in their efforts by Kris Collins ("Collins"), AKR's former office manager and Allan Levine ("Levine"), Arkin's long-time personal accountant who is purportedly acting as AKR's outside accountant. Defendants maintain that Levine has an inherent conflict of interest as the accountant for both Arkin and AKR and will resolve any conflict in Arkin's and Solbakken's favor. Defendants claim that both Collins and Levine have refused to respond to their inquiries. Further, defendants contend that Arkin has sought Levine's advice on litigation matters and then withheld such information from defendants on claims of privilege. Thus, Levine is not an independent agent, but is an advocate for Arkin's and Solbakken's interests.

Plaintiffs oppose the Order to Show Cause by submitting Arkin's personal affirmation, affidavits of Levine and Collins and an affirmation of plaintiffs' counsel Joseph A. Piesco. Plaintiffs' opposition appears predicated upon an incorrect assumption that the court in an order

dated February 11, 2013, directed that the parties resolve the claims as to defendants' wrongdoing in the accounting. In that order, the court held in abeyance the branch of defendants' motion as sought dismissal of the first through eighth Causes of Action in the complaint pending a full accounting on the ground that as a general rule partners cannot sue each other for conversion of partnership assets or other wrongdoing with respect to the partnership but must first resort to an accounting in which the rights of each party can be determined. The concluding paragraph of the order states: "Accordingly, at this juncture, a judicial accounting is the appropriate and exclusive remedy available to plaintiffs whereby the rights and liabilities of the partners will be finally determined and plaintiffs' allegations as to defendants' alleged wrongdoing can best be resolved." Plaintiffs read this language as directing that the claims based on alleged wrongdoing by defendants be resolved in the accounting.

On the basis of that erroneous interpretation of the court's Decision and Order, plaintiffs' opposition is focused on supporting such claims and refuting Defendants' counter-allegations as to plaintiffs' wrongdoing. Plaintiffs argue that the Order to Show Cause for appointment of an independent accountant is not appropriate because: (1) additional discovery is needed on the issues of defendants' alleged wrongdoing, the date of AKR's dissolution, and determining the extent of AKR's assets. Plaintiffs contend that the appointment of an independent accountant with no familiarity with the issues in the case will cause delay and burden AKR with unnecessary costs to the detriment of AKR's creditors. Plaintiffs also aver that Arkin will suffer the greatest harm as he owns a majority of the firm is in dissolution and is the only partner with a positive capital account. Plaintiffs propose that Arkin be designated as the winding up partner with authority to collect receivables and pay AKR's obligations, with all of defendants' claims and rights reserved until a final accounting. Plaintiffs maintain that if the court is inclined to appoint an independent accountant that the cost should not be borne by AKR, but rather should be shared equally by Kaplan Rice LLP and Arkin Solbakken LLP.

II. LETTERS OF PARTIES' COUNSEL

A. Supplemental Submissions and Proposed Orders

In addition to the formal submissions, counsel for the parties have submitted a series of letters in further support of their respective positions as well as proposed orders reflecting their views. The letters and accompanying documents are in the nature of unauthorized supplemental submissions and will not be considered in connection with this Decision and Order (*see* 22 NYCRR §202.70 Rule 18).

B. Documents from the Joint Representation File

By Decision and Order dated June 13, 2013, the Appellate Division, First Department, affirmed an order of this court entered on January 28, 2013, which confirmed certain discovery rulings of JHO Ira Gammernman. Specifically, the Appellate Division found that this court providently exercised its discretion in directing defendants' former counsel Ciampi LLC, to submit

to JHO Gammerman for *in camera* review certain communications in plaintiff, Solbakken's legal file made during Ciampi's joint representation of Kaplan, Rice and Solbakken, upon which Solbakken was not copied. *In dicta* the Appellate Division stated that:

“Although we only address the propriety of the *in camera* review, we note that communications between defendants Howard Kaplan, Michelle Rice, Solbakken, and Ciampi, LLC, made during the course of Ciampi's joint representation of them, fall within the scope of the attorney-client privilege because Kaplan, Rice, Solbakken, shared “a common interest” (*American Re-Insurance Co. v United States Fid. & Guar. Co.*, 40 AD3d 486, 490-491 [1st Dept 2007]; *Finn v Morgan*, 46 AD2d 229, 235 [4th Dept 1974]), and consulted Ciampi for their “mutual benefit” (*Martin v Slifkin*, 249 App Div 860 [2d Dept 1937]).

Those communications are not privileged within the context of Solbakken's adverse litigation against Kaplan and Rice [internal citations omitted]. However, those communications are privileged as against Solbakken's co-plaintiffs, who were not clients being jointly represented by Ciampi [internal citations omitted]. ‘The privilege belongs to the client’ and Solbakken cannot unilaterally waive it on defendants' behalf so as to benefit her co-plaintiffs [internal citations omitted].

Plaintiffs' counsel, in a letter dated June 26, 2013, contends that pursuant to the Appellate Division's decision, Solbakken may use as evidence in this case or any related action any communications in the joint legal file upon which Solbakken was not copied, which relate to the joint representation. Thus, by letter dated July 3, 2013, plaintiffs' counsel advised that at the scheduled oral argument date, July 19, 2013, Solbakken would submit evidence, including documents from her legal file.

Defendants' counsel responded by letter dated July 8, 2013, that Solbakken's request is improper because *inter alia*: (1) her submission of jointly privileged communications amongst defendants would violate the Appellate Division decision holding that such communications are privileged as against Solbakken's co-plaintiffs; and (2) her disclosure of such privileged communications to plaintiffs' counsel as well as her co-plaintiffs Arkin and AKR raises serious ethical issues. Counsel adds that if plaintiffs' counsel has received any such documents, it should be disqualified from representing plaintiffs.

Plaintiffs' counsel responded in a letter dated July 9, 2013. Plaintiffs observe that defendants, filed an appeal from the Court's order that allowed Solbakken to use the joint representation file in this or any related action and relied on and publicly filed the very same documents from Ciampi's joint representation, but seek to preclude Solbakken from submitting those same documents. Defendants argue that any such privilege has now been waived by defendants'

conduct. In addition, plaintiffs aver that they have produced all responsive emails between Arkin and Solbakken prior to April 30, 2012 that relate to matters in plaintiffs' complaint pursuant to the Court's order.

In a letter dated July 10, 2013, defendants' counsel denies that defendants have waived the joint privilege attached to communications amongst Kaplan, Rice, Solbakken and their counsel during their joint representation. Defendant adds that the documents to which plaintiffs' counsel refers (NYSCEF Doc. Nos. 521, 523, Exhibits "2" and "4") do not contain any legal advice and therefore no privilege attached.

III. DISCUSSION

A. Independent Accountant

In light of the highly contentious nature of the relationship among the partners in dissolution and the court's inherent power to appoint an accountant or other appropriate expert where complex financial data must be analyzed to resolve the litigation, appointment of an independent third party with no relationship to the parties or the dissolved firm as a neutral evaluator is the best option. An independent accountant is best situated to provide the court with unbiased information which is not tinged by the position of any party to this litigation (*see Board of Managers of the Bay Club Condominium v Bay Club of Long Beach, Inc.*, 15 Misc3d 282, 286 [Sup. Ct. Nassau Co. 2007]).

Sorting out AKR's assets and liabilities requires the specialized knowledge of an accountant. Since both parties' conduct appears equally at fault in unnecessarily complicating the issues and delaying resolution of this case, the cost of the independent accountant's services should be borne equally by plaintiff and defendants. The court will not charge the accountant with the task of directing discovery or determining the parties' liabilities. Giving the accountant such power would impermissibly delegate adjudicatory power to an improper person (*see Matter of P.J. Lynch Food Service, Inc.*, 31 AD3d 561563 [2d Dept 2006]; *Pittoni v Boland*, 230 AD2d 722 [2d Dept 1996]). Rather, references of this nature when made are limited to judicial hearing officers and referees. Accordingly, to the extent that any additional discovery is necessary in connection with the final accounting or to make a determination as to the parties' rights and liabilities with respect to the dissolved firm, the court will retain general supervisory powers with referral to Justice Gammerman as needed. He has been intimately involved in supervising discovery and possesses a detailed familiarity with the issues in the case.

Although Mr. Levine may have substantial prior knowledge of the books and finances of AKR, his longstanding relationship with Arkin renders him unsuited to serve in the role of the independent accountant. The parties were encouraged to confer and propose a firm to conduct the accounting. The parties were unable to make a joint proposal and instead have each proposed a candidate. Under the circumstances, the court is constrained to select an accountant who is connected with neither side.

Anthony Kendall, CPA, chairman of the accounting firm of Mitchell & Titus is hereby designated to be the independent accountant. His fees and expenses shall be borne equally by plaintiffs and defendants.

Counsel for the parties shall appear at a conference with the court, Part 49, Room 252, 60 Centre Street on August 8, 2013 at 9:30 AM at which time the scope of the assignment of the independent accountant will be considered. The Clerk of Part 49 shall send a copy of this order to Mr. Kendall who is invited to attend and participate. The matters for discussion shall include the terms of the engagement.

Plaintiffs' request to stay the case pending their appeal of the order appointing an independent accountant is denied.

B. Documents from Joint Representation File

As to Solbakken's use of alleged privileged documents taken from the joint representation file, the guidance of the Appellate Division shall govern. If defendants have deliberately disclosed documents that are covered by the attorney client privilege, they have waived the privilege as to all other communications on the same subject (*see AMBAC Indem. Corp. v Bankers Trust Co.*, 151 Misc 2d 334, 341 [Sup Ct NY County 1992]).

DATED: August 1, 2013

ENTER,



O. PETER SHERWOOD

J.S.C.