

Campuzano v Sher
2017 NY Slip Op 33295(U)
April 4, 2017
Supreme Court, Nassau County
Docket Number: 605379/16
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

DIANA CAMPUZANO, AVI ELISHIS;
and GREGG SALZMAN,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 605379/16

MOTION DATE: Mar. 24, 2017
Motion Sequence # 005

Plaintiff,

-against-

NEAL SHER; MICHAEL ENGELBERG; and
THE AMERICAN CENTER FOR CIVIL JUSTICE, INC.,
f/k/a THE RAUL WALLENBERG CENTER FOR
CIVIL JUSTICE,

Defendants.

The following papers read on this motion:

Order to Show Cause.....X
Affidavit in Support.....XX
Affirmation in Opposition.....X

Motion by defendant American Center for Civil Justice for relief from the order dated July 27, 2017, restraining defendant from disbursing funds whether in the ordinary course of business or otherwise, is **granted** to the extent of the order of March 20, 2017, as supplemented herein, and is otherwise **denied**.

The above action is one of three related actions which arise from the administration of defendant, The American Center for Civil Justice, Inc., a not-for-profit corporation, formed to promote and fund personal injury lawsuits, seeking compensation for victims of terrorist activity.

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Defendant Michael Engelberg, a physician, and Eliezar Perr, who is a rabbi, founded The Raoul Wallenberg Center for Civil Justice, Inc., on November 21, 1996 (Dkt 82). The Wallenberg Center was formed to establish a “civil rights organization” for the benefit of victims of terrorist activity. The Wallenberg Center’s articles of incorporation provide that the Center was organized exclusively for the purposes of being a charitable organization pursuant to Internal Revenue Code §501[c](3). The organization’s purposes included maintaining a “network of lawyers, researchers, journalists, investigators, and government officials” and “promot[ing] legislation that will simplify and speed the collection of punitive damages” (Id). However, the purposes of the Center also included “advis[ing] victims of their rights and methods of addressing compensation,” and identifying the “resources and assets of the sponsors of terrorism,” matters traditionally within the realm of legal representation. The Wallenberg Center was formed shortly after the federal Foreign Sovereign Immunities Act was amended by Congress to allow suits against states and organizations which support terrorist activity to proceed (See, **Calderon-Cardona v Bank of New York**, 770 F.3d 993, 998 [2d Cir 2014]).

Plaintiff Diana Campuzano was injured when three suicide bombers blew themselves up in the Ben-Yehuda pedestrian mall in downtown Jerusalem on September 4, 1997. Four people were killed in the attack and over 190 people were wounded.

On December 16, 1997, Campuzano issued a “power of attorney,” purporting to appoint Engelberg as her “true and lawful attorney” with “full power and authority” to commence litigation against “persons, agencies, governments, government instrumentalities” responsible for the attack. Engelberg’s power included “the selection of counsel and settlement authority” (Dkt 79).

On December 17, 1997, one day after the power of attorney was executed, Campuzano signed a “claimant and center agreement” with the Wallenberg Center. The agreement recites that Campuzano did not have the funds necessary for the “investigation, disbursements, expenses, and collection costs,” incident to a law suit against any “agencies or governments” responsible for the attack. The agreement provides that the Wallenberg Center would advance the out-of-pocket expenses of contemplated litigation and be reimbursed from the proceeds recovered. However, if Campuzano failed to “cooperate with [the] attorney” recommended by Wallenberg “or otherwise terminates this agreement,” Campuzano would reimburse the Center for those expenses. In consideration of Wallenberg’s efforts, Campuzano made a “pledge” to pay the Center 20% of the “net proceeds” of the recovery (Dkt 78).

The Raoul Wallenberg Center changed its name to The American Center for Civil Justice, Inc. (“ACCJ”) in April, 1999 (Dkt 89). ACCJ is a tax exempt organization pursuant to IRC § 501(c)(3). On January 20, 2005, ACCJ’s certificate of incorporation was amended

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to permit “distributions to such organizations and those that are committed to perpetuate the causes of civil liberties, civil justice, religious freedom and tolerance as guaranteed by the U.S. Constitution, and those that qualify as exempt organizations under § 501[c](3) of the Internal Revenue Code....” (Dkt 90).

On February 13, 2003, Engelberg retained Piper Rudnick to represent two groups of ACCJ claimants, the Heiser plaintiffs and the Campbell plaintiffs, in an action against Iran in the United States District Court for the District of Columbia (See Dkt 115). These plaintiffs were injured or killed in a terrorist attack which took place at the Khobar Towers in Dhahran, Saudi Arabia in 1996 (See, **Heiser v Islamic Rep of Iran**, 735 F.3d 934 [D.C. Cir 2013]). Trial of the Heiser/Campbell cases was to begin on May 5, 2003. Piper Rudnick agreed to charge its standard hourly rates, discounted by 10%. Fees were to be paid on a monthly basis until they reached \$450,000. Fees over that amount were to be “deferred” until collection on the judgment. Piper Rudnick understood that Engelberg held powers of attorney issued by the Heiser and Campbell plaintiffs. The retainer letter provides that payment of the fees was a liability of ACCJ and each of the plaintiffs. The Heiser/Campbell plaintiffs obtained a default judgment against Iran in the amount of approximately \$291 million (Dkt 13 at ¶ 11).

On September 10, 2003, counsel provided by ACCJ obtained a default judgment in favor of Campuzano against Iran in the United States District Court for the District of Columbia in the amount of \$18,952,725 (See, **Campuzano v Islamic Rep. of Iran**, 281 F.Supp.2d 258, 274 [D.D.C 2003]). The court awarded \$17,000,000.00 compensatory damages, and \$1,952,725 for loss of income. While Iran maintains assets in the United States, because of the issue of sovereign immunity, it has taken federal legislation, and an exceptionally long time, for the judgments in the underlying actions to be enforced (See, **Waldman v PLO**, 835 F.3d 317 [2d Cir 2016]).

On November 29, 2007, Engelberg retained Piper Rudnick’s successor, DLA Piper, for the purpose of collecting the Heiser and Campbell plaintiffs’ judgment (Dkt 115). Engelberg represented that the powers of attorney were still in effect. Payment of DLA Piper’s fees was to remain a liability of ACCJ and the judgment creditors. DLA Piper was to receive a contingency fee of 10% of the first \$100 million collected, 15% of recoveries between \$100 million and \$200 million, and 20% of all recoveries over \$200 million. In the retainer letter, DLA Piper acknowledged that ACCJ “controlled,” via powers of attorney, other judgments which DLA Piper had “no involvement” in obtaining. ACCJ and DLA Piper agreed that, for DLA Piper to represent the other judgment creditors, the other judgment creditors would have to “subordinate” their judgments to the judgments of the Heiser/Campbell plaintiffs, unless a court of competent jurisdiction were to order a different priority. Finally, DLA Piper and ACCJ agreed that, if

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DLA Piper did represent the other judgment creditors, it would be paid pursuant to a separate fee agreement, which would not be "less, on a percentage basis," than the contingency fee for collecting the Heiser/Cambell judgment.

On July 14, 2011, Engelberg retained DLA Piper for the purpose of collecting the judgments, other than the judgment held by the Heiser/Campbell plaintiffs (Dkt 116). DLA Piper acknowledged that Engelberg held powers of attorney for the other judgment creditors. As before, it was agreed that payment of DLA Piper's fees was a liability of ACCJ and each of the judgment creditors. Engelberg and DLA Piper agreed that the Heiser/Campbell judgments would be paid in full, and the other judgment creditors would then be paid on a pro rata basis. Finally, Engelberg and DLA Piper agreed that DLA Piper would be paid on a contingency fee basis, 15% of the first \$250 million recovered, and 10% of all recoveries over \$250 million.

The same day, ACCJ sent out a notice to all its "Judgment Creditors." The notice states that collection of judgments against Iran remains "extremely difficult" (Dkt 95). According to the notice, the "major obstacles" to enforcement included "identifying and attaching" Iran's assets, as well as "getting foreign countries to recognize" U.S. federal court judgments. The notice stated that, when assets were located, judgment creditors often "pit themselves" against other "groups of judgment holders," seeking to obtain priority. American Center proposed that, "Upon your approval," it would engage the "international law firm" of DLA Piper LLP (US). The notice stated that DLA Piper had been "pursuing Iranian assets" to satisfy judgments in the amount of \$591,089,956.00 which had been recovered by the Heiser plaintiffs and the Campbell plaintiffs in the United States District Court for the District of Columbia. However, the notice stated that DLA Piper was under a "legal and ethical constraint" to satisfy the Heiser and Campbell judgments in full, before the ten other ACCJ claimants received any payment. The notice proposed that, after the Heiser and Campbell judgments were paid, the ten other ACCJ claimants would receive a pro rata distribution from any funds which were remaining. DLA Piper's fee for this service would be based on a contingency fee only and would not exceed 20%. The notice stated that DLA Piper's fee was "extremely fair and quite favorable to you." Although, the notice stated that DLA's Piper's fee was "independent" of the claimant's fee agreement with ACCJ, the combined fees would "not exceed 40%." The notice was sent out by Jedd Perr on behalf of the ACCJ. Campuzano accepted the DLA Piper retainer and contingency fee on July 26, 2011 (Dkt 96).

Defendant Neal Sher is general counsel to the ACCJ. Campuzano alleges that, without her knowledge, Sher appeared on her behalf in the United States District Court for the District of Columbia on November 23, 2011. Campuzano alleges that Sher filed a motion in the district court pursuant to 28 USC § 1601[c] for permission to enforce her 2003

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judgment. Sher concedes that, when Campuzano's judgment was about to expire, he made a motion to extend, or renew, the judgment.

In September 2013, ACCJ adopted amended bylaws, providing that it would have no members and would be managed by the board of directors (Dkt 92). Engelberg was allegedly a director of ACCJ at all relevant times.

On December 29, 2014, Engelberg commenced a derivative action against Perr and other officers or directors of ACCJ for breach of fiduciary duty. Engelberg alleges that the defendants have diverted over \$20 million of ACCJ funds to profit and not-for-profit companies which they own or control (Index No 606919/14). Engelberg further alleges that defendants have donated over \$837,000 of ACCJ funds to various Jewish and educational organizations unrelated to ACCJ's purpose of obtaining compensation for victims of terrorist activity.

Engelberg alleges that Eliezar and Jedidiah Perr diverted settlement proceeds to another not-for-profit, The American Center for Civil Justice, Religious Liberty, and Tolerance, Inc., which Jedidiah Perr established in New Jersey. Engelberg further alleges that Jedidiah Perr diverted terrorism litigation to American Recovery Center, LLC, ("ARC"), a for-profit limited liability company of which he is the sole member. Finally, Engelberg seeks an accounting as to the affairs of ACCJ.

In their answer, defendants Eliezer Perr, Jedidiah Perr, and Milton Pollack assert counterclaims against Engelberg for breach of fiduciary duty, and a declaratory judgment that plaintiff Engelberg is not a director of ACCJ. Defendants allege that plaintiff Engelberg has enriched himself by paying himself over \$1.2 million between 2001-2003 from ACCJ, as well as \$340,000 in pension contributions. While Perr and Pollack purport to assert these counterclaims individually, there are actually derivative claims on behalf of ACCJ. Additionally, defendants allege that Engleberg channeled funds to a charity which he controlled, the New York Center for Civil Justice, Tolerance & Values, Inc. The New York Center obtained its tax exempt status by representing to the Department of Treasury that it met the 1/3 "public support test," rather than relying upon "pledges" from victims of terrorism (See Dkt 47, Index No 60189/16 infra).

On March 14, 2016, Joseph Orlow and other individuals who claimed to be innocent board members of the New York Center for Civil Justice, Tolerance & Values brought a derivative action against Engelberg for breach of fiduciary duty and seeking to remove him as a board member (Index No 601689/16). Orlow alleges that Engelberg enriched himself by diverting \$4.3 million of ACCJ's charitable assets to the New York Center. Orlow asserts that the New York Center is not a bona fide charitable organization.

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On June 21, 2016, in view of the reciprocal claims of breach of fiduciary duty on the part of the directors of ACCJ, the court on its own motion restrained the parties from conducting any unauthorized activities, not authorized by the certificate of incorporation, or paying out or transferring any property of the corporation, except in the ordinary course of business or by permission of the court. The court directed the parties to submit an accounting of the affairs of ACCJ for the five years preceding the commencement of the action. The balance sheet of ACCJ, which was submitted in response to the order, showed net assets of \$1,942,300.75, as of June 30, 2016.

Plaintiff Diana Campuzano, commenced the present action against defendants Neal Sher, Michael Engelberg, and ACCJ on July 20, 2016. Plaintiff asserts claims for malpractice and violation of Judiciary Law § 487 as to defendant Sher and breach of fiduciary duty and negligence as to all of the defendants. For reasons which are unexplained, Campuzano has not named Perr as a defendant in her action.

In the Campuzano case, ACCJ is represented by Koffsky Schwalb LLC, the same attorneys who represent Perr and Pollack in the derivative action. Engelberg is represented by Livingston Howe LLP in both the Campuzano and derivative actions. The Weinreb Law Firm, PLLC represents ACCJ as a nominal defendant in the derivative action. Sher is pro se in the Campuzano action.

As noted, on September 10, 2003, the U.S. District Court for the District of Columbia entered a judgment in favor of Campuzano in the amount of \$18,952,725. Campuzano alleges that defendants breached their fiduciary duty to plaintiff by failing to submit a claim on her behalf with a restitution trust fund, consisting of approximately \$1.9 billion. The fund is being administered by Stanley Sporkin, (U.S. District Judge, ret.), the trustee appointed by United States District Court Judge Katherine Forrest, in the Southern District of New York (See, **Bank Markazi v Peterson**, 136 S.Ct. 1310 [2016]).

By orders dated September 29 and November 16, 2016, Campuzano's motion for an order of attachment was **granted** as against defendants Engelberg and ACCJ in the amount of \$9,512,860, the pro rata portion of her judgment which she would have recovered had ACCJ filed a claim with the federal restitution fund on her behalf (Dkt 130, 187, 188).

Because all of the judgment creditors issued powers of attorney, ACCJ owed a fiduciary duty to treat all of the judgment creditors fairly and was required to undertake collection efforts on behalf of all judgment creditors on a pro rata basis (Cf. **In re Shubert**, 10 NY2d 461 1962)). Thus, Campuzano established a likelihood success on the merits, of her claim that ACCJ breached its fiduciary duty to her, by retaining collection counsel only on behalf of the Heiser/Campbell plaintiffs.

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The court noted that the accounting which ACCJ submitted to the court stated that its net assets were \$5,915,477.09 on March 31, 2011 and \$1,942,300.75 on June 30, 2016. Thus, ACCJ's net assets decreased by \$3,973,176.34 in a little over a five year period. This significant decline in assets was not sufficiently explained. In view of the reciprocal claims of breach of fiduciary duty on the part of Engelberg and Perr, plaintiff established that defendants were in the process of secreting ACCJ's property.

The court noted that the amount of the order of attachment to which plaintiff appeared to be entitled greatly exceeded ACCJ's current working capital. Despite the significant impact which the order of attachment might have had on ACCJ's operations, the court determined that an order of attachment should be granted as a matter of discretion.

ACCJ's educational and lobbying efforts appeared to have a charitable purpose. However, the accounting which ACCJ submitted suggested that the bulk of its resources were used to pay salaries of officers and fund personal injury actions on behalf of victims of terrorism. While ACCJ argued that the funding of such lawsuits was necessary, it made no showing that the underlying lawsuits could not have been financed by the plaintiffs' attorneys through their own resources, private lending, insurance, or other conventional means (See, "Lawyers Create Insurance Policy to Protect Litigators in Contingency Cases," NYLJ 9/14/16, p.2, col.1). Because of the lack of proof as to financial necessity, and ethical concerns discussed infra, the court **granted** the order of attachment as a matter of discretion.

Rule 1.7 of the Professional Conduct Rules provides that a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing "differing interests." Since the Heiser/Cambell judgment creditors and Campuzano were pursuing the same assets to enforce their judgments, and the assets within the United States appeared insufficient to satisfy all judgments, their interests clearly differed. Thus, having undertaken to represent the Heiser/Campbell judgment creditors in enforcement proceedings, DLA Piper could not represent Campuzano. The artifice of subordinating Campuzano's judgment to that of the Heiser/Campbell clients did not clear DLA Piper's conflict of interest.

Nevertheless, when Campuzano accepted the DLA Piper retainer and contingency fee on July 26, 2011, she became DLA Piper's client. Thus, DLA Piper's professional obligation was to Campuzano, not to ACCJ. Had DLA Piper consulted with Campuzano promptly after their retainer, the firm would have learned of her 1997 "claimant and center agreement" with ACCJ. Moreover, the firm may have had a professional obligation to advise Campuzano that the agreement was unenforceable for overreaching.

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Although the court granted plaintiff an order of attachment as to all of ACCJ's assets, Campuzano chose to levy only upon ACCJ's "interest" in the funds "scheduled to be released" to the Heiser plaintiffs in the action before Judge Forrest. In view of sovereign immunity, no garnishment or other process of this court could be directed to Trustee Sporkin (See, **Carpenters Pension Fund v Dept. of Health**, 721 F.3d 217 [4th Cir 2013]). Thus, the order of attachment states upon its face in bold type, "This order of attachment may not be served upon Stanley Sporkin, trustee, or upon any other federal officer or employee." To the extent that Campuzano sought an order of attachment against defendant Sher, her application was **denied**.

In view of these considerations, on July 27, 2016, this court ordered defendants Sher, Engelberg, and ACCJ to pay any funds received from Trustee Sporkin immediately into escrow with DLA Piper, counsel for the Heiser plaintiffs, pending a ruling on the application for the order of attachment. While DLA Piper was free to distribute funds to judgment creditors in the federal action, DLA Piper was restrained from paying any funds over to ACCJ, pending further order of the court. Additionally, defendants Sher, Engelberg, Perr, and ACCJ were restrained from disbursing any funds of ACCJ, whether in the ordinary course of business or otherwise, pending further order of the court (Dkt 40) (Cf. N-PCL § 1113).

By order to show cause dated March 8, 2017, defendant ACCJ moves for relief from the July 27, 2016 order to the extent that it restrains defendant from disbursing funds whether in the ordinary course of business or otherwise. ACCJ requests that it be permitted to pay expenses in the ordinary course of business, and going forward, to pay up to \$25,000 to accountants for federal and state tax filings for 2015 and 2016, to approve payment of \$300,000 legal fees to pay lawyers to enforce judgments against Iran in Canada and the United Kingdom on behalf of three Fort Hood claimants, as well as payment of legal fees for representing ACCJ as a litigant in these actions, as well as \$200,000 for its "charity counsel." Additionally, defendant ACCJ requests an order "advising, directing, or permitting" federal Trustee Stanley Sporkin to release \$2,418,575.95 to defendant Neal Sher, Esq., to be held in escrow.

By way of interim relief, on March 20, 2017, on consent of all parties, including the Attorney General, the court issued an order approving the following expenditures: a) \$5,000 to Simone Beckeld (ACCJ's part time secretary) for salary from October 2016 through February 2017, as well as \$1,000 per month going forward; b) \$62,500 to defendant Neal Sher, ACCJ's general counsel, for salary from October 2016 through February 2017; c) payroll taxes owed through February 2017 of \$14,200.98; d) \$310.20 to Intuit Payroll Service for the period October 2016 through February 2017; e) \$889.39 taxes owed to IRS, \$182.57 taxes owed to New York State, and \$5 taxes owed to New Jersey, plus any accrued

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interest or penalties; f) \$517 workers compensation premium to AmTrust North America, plus any accrued premium; g) \$1,725.00 to Riviera Business Center for rent for ACCJ's New Jersey office for January through March 2017, plus office rent going forward; h) \$396 mail forwarding fee to forward mail to New York office; i) \$970.03 telephone charges, plus interest and penalties, and telephone charges going forward; j) \$789 Diamond Reporting Service; k) \$218.64 AMEX credit card late fees and any additional late fees that accrue; l) \$149,300.65 legal fees to Koffsky Schwalb LLC (counsel to ACCJ in the present action); m) \$2,261.30 to Precision Legal Services for document hosting services; n) \$4,557.55 to JAMS for mediation services. The order provides that documentation evidencing the payments shall be submitted to the court and the Attorney General.

With regard to the remainder of the requested expenses, Engelberg objects to payment of annual salaries of ACCJ officers, including \$150,000 for Sher and \$200,000 for Eliezar Perr, and questions what services they perform for the organization. Engleberg objects to the payment of legal fees because the bills have been redacted and "it is impossible to tell what services were performed or whether the fees sought are reasonable." Engleberg asserts that the New Jersey Center, controlled by Perr, is responsible for payment of some of the legal bills. Thus, Engleberg argues that payment of the legal fees by ACCJ will result in a diversion of charitable assets to the New Jersey Center.

While Engelberg has no objection "in principle" to the payment of \$24,390 legal fees to "outside counsel" for enforcement work in U.K. and \$38,902.67 in Canada, he requests that "detailed invoices" be submitted by those attorneys. Engleberg objects to the payment of \$12,242 to "Ethics Counsel" Roy Simon on the grounds that there is no explanation of the nature or purpose of his advice. Engelberg objects to the payment of \$158,074 in legal fees to Loeb & Loeb LLP for representing ACCJ in an inquiry before the Attorney General between August 6, 2016 and February 6, 2017 on the ground that the time and total cost is excessive.

Engelberg objects to the payment of a \$50,000 fee to The Weinreb Law Firm for representing ACCJ in the derivative action on the grounds that there has been "little activity" in that case. However, Engelberg would approve payment of Weinreb's fee to the extent it will "help the parties resolve" the derivative action. Finally, Engelberg has no objection to the payment of Koffsky Schwalb, i.e. Perr's, legal fee, provided Engelberg's legal fees are "given equal treatment."

Although the Attorney General is not a party to this action, the court requested the Office of the Attorney General to comment on the application for additional payment in view of its responsibility as the regulator of charities and statutory representative of charitable beneficiaries. OAG states that it supports continued monitoring by the court over ACCJ's

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expenditure of charitable assets “since the concerns about ACCJ’s governance and administration that led the court to impose the restraining order are still present.” However, because funds “earmarked” for ACCJ from the federal restitution fund appear to be adequate security for Campuzano (and other claimants represented by her counsel), OAG does not oppose “reasonable and necessary expenses” incurred in the ordinary course of ACCJ’s operations, subject to ongoing review and oversight by the court.

As officers and directors of ACCJ, Engelberg, Perr, and Sher owe a fiduciary duty to the not-for profit corporation (N-PCL § 717). Since Sher is an attorney, and Engelberg and Perr undertook roles bordering upon, if not actually performing, legal services, they all owed a fiduciary duty to Campuzano (**Matter of Cooperman**, 83 NY2d 465, 472 [1994]).

In the action commenced by Campuzano, ACCJ may not indemnify Engelberg, Perr, or Sher for their attorney’s fees, unless they acted in good faith (N-PCL § 722[a]). In the derivative action, ACCJ may not indemnify the officers for their legal fees, unless they are not found liable to the corporation and were in good faith (N-PCL § 722[c]).

Although legal fees were granted to Sher and to Koffsky Schwalb, who represent Perr in the derivative action, those awards of fees are subject to review upon a final accounting. Additionally, Engelberg or Perr may be eligible to receive an attorney fee, if they are successful in the derivative action (N-PCL § 6232[e]).

A not-for-profit corporation must be formed exclusively for a purpose, not for pecuniary profit or financial gain (N-PCL § 102[5]). No part of the assets, income, or profit of the corporation may be distributable to, or enure to the benefit of its directors or officers, except to the extent permitted by the Not-For-Profit Corporation Law (Id). Where the Attorney General is of the view that a not-for-profit corporation has procured its formation through fraudulent misrepresentation, or has exceeded the authority conferred upon it by law, he may bring an action for the dissolution of the not-for-profit corporation (N-PCL § 1101).

Since the Attorney General has not sought the dissolution of ACCJ, he presumably regards the promoting of litigation to secure compensation for victims of terrorist activity as a proper purpose for a not-for-profit company. Nevertheless, courts have inherent power to regulate the legal profession (**Brown v Blumenfeld** 103 AD3d 45, 59 [2d Dept. 2012]). This inherent power encompasses activity by non-attorneys who facilitate improper conduct by lawyers, regardless of the charitable value of the underlying litigation. This court restrained ACCJ from disbursing funds because of concerns that ACCJ’s business model violated the prohibition on solicitation of legal business by non-lawyers, the duty of undivided loyalty, and the prohibition of fee splitting with non-attorneys.

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It is unlawful for an attorney to employ a non-attorney for the purpose of soliciting clients (Judiciary Law § 482; **Matter of Boter**, 46 AD3d 1 [1st Dept. 2007]). Thus, DLA Piper, or other firms to which victims of terrorism were referred, could not engage Engelberg to solicit clients. This ethical prohibition could not be circumvented by the artifice of Sher serving as ACCJ's general counsel.

ACCJ's initial solicitation of Campuzano, coming so soon after the terrorist attack, suggests overreaching. The provision in the claimant agreement that Campuzano would be liable for expenses, if she terminated her relationship with the "recommended attorney," appears designed to deprive her of her right to discharge her attorney at any time. As noted, the solicitation of DLA Piper in the July 2011 notice to judgment creditors was misleading in that it suggested that Campuzano should accept counsel subject to a conflict of interest, rather than retain independent counsel. At the very least, ACCJ's promoting of DLA Piper's representation of Campuzano, and the representation itself, had the appearance of impropriety.

The duty of an attorney to deal fairly, honestly, and with undivided loyalty to the client superimposes a set of special and unique duties including honoring the client's interests over the attorney's (**Matter of Cooperman**, 83 NY2d 465, 472 [1994]). Thus, a lawyer may not make an agreement with a client for an excessive or illegal fee (Prof Conduct Rule 1.5[a]). Moreover, since Engelberg held Campuzano's power of attorney, he owed her the highest duty of morality, fidelity, loyalty, and fair dealing (**Matter of Ferrara**, 7 NY3d 244, 254 [2006]). This duty of good faith included the duty to disclose to Campuzano that DLA Piper had agreed on a contingency fee of 15%, for the first \$250 million recovered for the Heiser plaintiffs, rather than charge her a 20% rate.

Professional Conduct Rule 5.4 provides that a lawyer shall not share legal fees with a non-lawyer. As a matter of public policy, pledge agreements calculated to foster eleemosynary enterprises are enforceable (**Woodmere Academy v Steinberg**, 41 NY2d 746 [1977]). Thus, ACCJ cannot claim that Campuzano's "pledge" to pay 20% of her net proceeds to ACCJ was a voluntary donation on her part. Whether the arrangement for a 20% "pledge," on top of the contingency fee payable to outside counsel, was fee-sharing or not, it has the appearance of impropriety. It would appear that such impropriety could be cured by amending ACCJ's articles of incorporation to provide for funding solely by voluntary contributions from non-clients, although the issue may best be determined by the Attorney General. In any event, the court cannot condone these ethical violations by approving compensation for defendant Perr, or defendant Sher going forward. Accordingly, so much of defendant ACCJ's motion as requests permission to pay Sher his salary going forward, and to pay salary to defendant Eliezar Perr is **denied**.

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Defendant ACCJ's motion for approval of the payment of \$158,074 in legal fees to Loeb & Loeb LLP for representing ACCJ in an inquiry before the Attorney General between August 6, 2016 and February 6, 2017 is **granted**. There is no evidence that the time and total cost is excessive.

Defendant ACCJ's motion for approval of the payment of \$12,242 to "Ethics Counsel" Roy Simon is **granted**. An expert in legal ethics may give an opinion, if the expert is properly qualified and the opinion reflects an acceptable level of certainty (**Doviak v Finkelstein**, 137 AD3d 843, 847 [2d Dept. 2016]). In view of the apparent ethical violations presented, consultation with an ethics expert is a reasonable and necessary expense-even after the fact.

ACCJ is a nominal defendant in the derivative action. Regardless of whether Engelberg or Perr is the party who breached his fiduciary duty, ACCJ need do little more than wait to receive its judgment. Thus, it is unclear what services The Weinreb Law Firm has performed for ACCJ in the derivative action. Nevertheless, Weinreb may yet perform valuable services for ACCJ. Defendant ACCJ's motion to pay The Weinreb Law Firm \$50,000 is **denied**.

If a client is unable to pay her own legal fees, the fees may be paid by another party. (See, e.g. **Frankel v Frankel**, 2 NY3d 601 [2004][matrimonial action]). In such circumstance, the person to whom the lawyer owes a professional obligation is the client, not the person who is paying the fee. Nevertheless, there is no evidence that outside counsel in U.K. or Canada did not honor their professional obligation. Defendant ACCJ's motion to pay \$24,390 to outside counsel in the U.K. and \$38,902.67 to Torys LLP, outside counsel in Canada is **granted**.

Without statutory authorization, the federal government and its agencies may not be compelled to serve as garnishées on New York process (Siegel, New York Practice 5th Ed, § 491). ACCJ cites no federal statute authorizing this court to allow the order of attachment to be served on Trustee Sporkin. Accordingly, defendant ACCJ's motion for an order "advising, directing, or permitting" federal Trustee Stanley Sporkin to release \$2,418,575.95 to defendant Neal Sher, Esq., to be held in escrow is **denied**.

So ordered.

Dated APR 04 2017

ENTERED

APR 10 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Suriani

J.S.C.