

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D15304
Y/gts/hu

_____AD3d_____

Argued - April 26, 2007

ROBERT A. SPOLZINO, J.P.
GLORIA GOLDSTEIN
MARK C. DILLON
EDWARD D. CARNI, JJ.

2006-03417
2006-03418

DECISION & ORDER

Victor Schlesinger, etc., respondent, v
Nathan Schlesinger, etc., et al., defendants;
Kolel Damsek Eliezer, Inc., nonparty-appellant.

(Index No. 27246/00)

Edward Rubin, New York, N.Y. , and Israel Vider, Brooklyn, N.Y. (Ronald J. Aiello of counsel), for nonparty-appellant (one brief filed).

Goldberg Rimberg & Friedlander, PLLC (Mischel & Horn, PC, New York, N.Y. [Scott Horn] of counsel), for respondent.

In an action, inter alia, to impose a constructive trust on certain real property, the nonparty Kolel Damsek Eliezer, Inc., appeals from (1) a judgment of the Supreme Court, Kings County (Firetog, J.), dated November 15, 2005, which, upon remittitur from this Court by decision and order dated September 12, 2005 (*see Schlesinger v Schlesinger*, 21 AD3d 942), inter alia, determined that the estate of Jack Schlesinger has a 50% ownership interest in the title to certain real property located in Brooklyn, and (2) an order of the same court dated February 27, 2006, which denied its motion pursuant to CPLR 5015(a) to vacate or modify the judgment and its caption.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying that branch of the appellant's motion which was to modify the caption on the judgment, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed, without costs or disbursements, and the judgment dated November 15, 2005, is amended by deleting the appellant's name from the caption thereof; and it is further,

December 4, 2007

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ORDERED that the judgment, as amended, is affirmed, without costs or disbursements.

That branch of the motion of Kolel Damsek Eliezer, Inc. (hereinafter Kolel), which was to modify the caption on the judgment by deleting its name therefrom should have been granted. On the prior appeal, Kolel was permitted to file a brief as amicus curiae; however, its name did not appear in the caption of the action (*see Schlesinger v Schlesinger*, 21 AD3d 942). We reject the respondent's contention that Kolel was properly included in the caption on the judgment since it was liable for costs on the prior appeal. Since Kolel's status on the prior appeal was that of an amicus curiae, not a party to the appeal, it was not liable for costs. Further, the judgment awards no relief against Kolel.

The substantive provisions of the judgment are in accordance with this Court's decision and order on the prior appeal (*see Schlesinger v Schlesinger*, 21 AD3d 942). Accordingly, there is no basis to disturb those provisions.

SPOLZINO, J.P., GOLDSTEIN, DILLON and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court