

Berger v ISK Manhattan, Inc.

2007 NY Slip Op 31169(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0109226/9226

Judge: Richard F. Braun

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

PRESENT: **HON. RICHARD F. BRAUN**

PART 23

Index Number : 109226/2002

J.S.C.

BERGER, KEVIN

vs

ISK MANHATTAN, et al

INDEX NO. _____

MOTION DATE

1/11/07

Sequence Number : 004

MOTION SEQ. NO. _____

COUNSEL FEES, EXPENSES

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to ~~for~~ ^{expenses and} recover disbursements

*from Dick
Petition*

PAPER & NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~

pursuant to January 11, 2007 stipulation, the issue of whether plaintiff's attorney waived the right to be reimbursed for expenses and disbursements, through photostats by plaintiff's attorneys, is referred to a special referee to hear and determine.

This constitutes the order of this Court.

See separate Opinion.

FILED

APR 09 2007

COUNTY CLERK'S OFFICE
NEW YORK

ENTER

Dated:

New York, New York April 3, 2007

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REPRESENTATIVE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

----- X
KEVIN BERGER,

Index No. 109226/02

Plaintiff

OPINION

against

ISK MANHATTAN, INC., McDONALD'S
CORPORATION and VP 57 LLC

Defendants
----- X

RICHARD F. BRAUN, J.:

Summary judgment was awarded in part by this court and in part by the Appellate Division, First Department, dismissing this action. Plaintiff's counsel now moves for recovery of costs and expenses (improperly brought by notice of petition, not notice of motion, which this court will disregard as a mere non-prejudicial irregularity, pursuant to CPLR 2001^{*)}).

Plaintiff's counsel is entitled to be reimbursed for the expenses and disbursements at issue because plaintiff was ultimately liable for them (Code of Professional Responsibility DR 5-103 [B] [1] [22 NYCRR 1200.22 (b) (1)]; *Dreyer v Dondorf*, 143 Misc 2d 760, 761 [Sup Ct, Albany County 1989]; see *Rizzi v City of New York*, 51 AD2d 906, 907 [1st Dept 1976]).

However, plaintiff contends in essence that plaintiff's counsel waived the right to such a reimbursement through the statements of two of the attorneys of plaintiff's counsel.

Waiver requires the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable (citation omitted). Waiver may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported

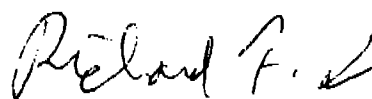
* Contrary to plaintiff's assertion, there is no requirement that plaintiff's attorney had to move by order to show cause.

[* 3]
advantage (citation omitted).

General Motors Acceptance Corp. v Clifton-Fine Cent. School Dist., 85 NY2d 232, 236 [1995].)

A hearing must be held as to whether one or both of the attorneys from plaintiff's counsel waived the right to such reimbursement. Pursuant to the stipulation between the parties, the hearing will be held before a referee to hear and determine.

Dated: New York, New York
April 4, 2007



RICHARD F. BRAUN, J.S.C.

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