

Zodkevitch v Feibush
2007 NY Slip Op 32961(U)
September 18, 2007
Supreme Court, New York County
Docket Number: 0601342/2005
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**
Justice

PART 15

R. ZODKEVITCH & Romy Z.
I FEIBUSY, et al

INDEX NO. 601342/06
MOTION DATE 8/24/07
MOTION SEQ. NO. 013
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 9/13/07

WALTER B. TOLUB
WBT
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Check if appropriate: DO NOT POST REFERENCE

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 15

-----X
RONY ZODKEVITCH, M.D., and RONY Z, LLC

Plaintiffs,

DECISION and ORDER

v.

Index. No. 601342/06

IGAL FEIBUSH, STEVEN SPIEGEL, ESQ.,
DAVID YORK and PHYLLIS YORK,

Defendants.

-----X
TOLUB, WALTER, J.S.C.

In this action alleging, *inter alia*, that defendants breached their fiduciary duties to plaintiff, Rony Zodkevitch ("Zodkevitch") and acted in concert to deprive him of his management and ownership rights in Toughlove America, LLC ("TLA") and American Family Health Services Group, LLC ("AFHSG"), plaintiffs move pursuant to CPLR 3124 to compel the Law Offices of Stephen W. Edwards ("Edwards"), attorney for defendants Igal Feibush ("Feibush") and David and Phyllis York ("the Yorks"), to produce the documents described in plaintiffs' *subpoena duces tecum*, dated and served July 23, 2007.

Feibush and the Yorks cross move to quash two subpoenas. The first subpoena, served by plaintiff on American Express, seeks records of Feibush's credit card expenses from June, 2005 through the present (8/23/07 Schrick Aff., Ex. C). The second subpoena, served by

plaintiff on Bank of America, seeks records for an account maintained by Feibush's father, Alex,¹ (8/23/07 Schrick Aff., Ex. B) Feibush and the Yorks also cross move to compel plaintiffs to respond to Feibush's interrogatories and document requests.

The facts of this case have been recited at length in prior decisions and will not be repeated here.

The Motion

The subpoena demands that Edwards produce: 1) all relevant retainer agreements; 2) "all checks, wire transfer records, deposit slips, receipts and other Documents reflecting payments made to You on or after November 1, 2006 by Feibush, Alex Feibush, the Yorks, TLA, AFHSG," or any entity owned and controlled by Feibush, his father or the Yorks; and 3) documents concerning Edwards's efforts to ensure that the law firm did not violate, or assist Feibush in violating the August 15, 2006 preliminary injunction order.

Edwards argues that motion to compel the subpoena should be denied because the subpoena seeks the production of privileged information.

In response, plaintiffs contend that the records are highly relevant in that they will permit plaintiffs to discover whether Feibush paid Edwards with TLA funds. They also argue that Feibush's former attorneys, Hodgspn Russ, have produced similar records and that Edwards waived any objection by failing to respond to the subpoena, within 20 days, stating his objections.

Plaintiffs' motion to compel Edwards to produce the documents described in the subpoena is granted to the extent that Edwards is directed to produce all relevant retainer

¹ That branch of the motion seeking to quash the Bank of America subpoena is moot as the bank has already produced the records in response to the subpoena.

agreements and all checks, wire transfer records, deposit slips, receipts and other documents reflecting payments made by Feibush or his father or the Yorks, TLA, AFHSG or any entity the Feibushs or the Yorks own or control. (See, *Oppenheimer v. Oscar Shoes, Inc.* 111 A.D.2d 28 [1st Dept 1985][“Confidentiality has been held not to apply to fee arrangements between attorney and client.”]; *Priest v. Hennessey*, 51 N.Y.2d 62 [1980]) The motion is otherwise denied because plaintiffs’ request for documents concerning Edward’s efforts to ensure that he did not aid Feibush in violating the preliminary injunction appears to call for the disclosure of confidential communications between lawyer and client made for the purpose of rendering legal advice. (See, *Spectrum Sys. Intl. Corp., v. Chemical Bank*, 78 N.Y.2d 371 [1991])²

The Cross Motion

In support of the cross motion to quash the subpoena served on American Express, Feibush and the Yorks argue that plaintiffs seek irrelevant information and that the production of those records would lead to the disclosure of all of Feibush’s personal expenses.

In response, plaintiffs’ correctly argue that the American Express statements are material and necessary because the records produced by North Fork Bank, in response to a subpoena, revealed that Feibush paid his American Express bills using more than \$37,000 of TLA’s funds. Plaintiffs are entitled to a complete set of Feibush’s American Express statements from June, 2005 through the present so that they can determine whether Feibush’s use of TLA funds to pay these bills was for a legitimate business purpose. (See, CPLR 3101[a]; *Fox v. Fox*, 96 A.D.2d

²In response to a similar request, Hodgson Russ stated, “We decline to respond to REQUEST number 5, not only on the grounds of attorney client privilege, but also because the form of the request calls upon us to establish by way of documents that the firm ‘did not violate, or aid and abet the violation of a certain order granting preliminary injunction. . .’, in other words to establish a negative.” Plaintiffs did not object to this response.

571 [2nd Dept 1983)]³

That branch of the cross motion seeking to compel plaintiffs to respond to Feibush's first set of interrogatories and document requests is granted to the extent that, notwithstanding the stay of this action (See, 9/11/07 decision and order), plaintiffs are directed to respond to those requests and/or move for a protective order within 30 days after Feibush produces documents in response to plaintiff's discovery requests as directed in this court's September 11, 2007 decision.⁴

Settle Order.

DATE 9/10/07



Hon. Walter B. Tolub, J.S.C.

³ Feibush served a purported motion to quash the subpoena on American Express but that motion was never filed with the court or served on any other party and is a nullity.

⁴ Plaintiffs' letter dated August 15, 2007 (8/23/07 Schrick Aff., H, purports to "respond" to the discovery demands by stating that they are palpably improper because Feibush has not lived up to his discovery obligations and because they are overly burdensome and abusive and seek privileged physician-patient information. However, plaintiffs have not moved for a protective order (see, CPLR 3103).