

**Israel Discount Bank of N.Y. v Schwebel**

2008 NY Slip Op 30198(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0101357/2007

Judge: Shirley W. Kornreich

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PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 101357/2007  
**ISRAEL DISCOUNT BANK OF NEW**  
 VS.  
**SCHWEBEL, AVROHOM M.**  
 SEQUENCE NUMBER : 003  
 SEVER ACTION

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

\_\_\_\_\_  
42  
3  
4,5

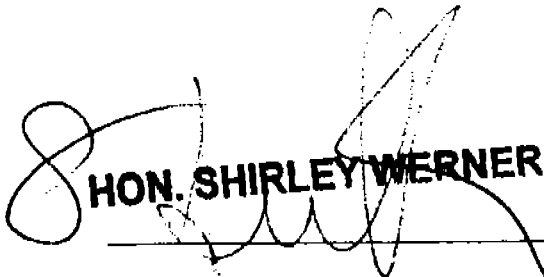
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**FILED**  
 JAN 25 2008  
 NEW YORK  
 COUNTY CLERK'S OFFICE

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

Dated: 1/22/08  **HON. SHIRLEY WERNER KORNREICH**  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
ISRAEL DISCOUNT BANK OF NEW YORK, IDB  
FACTORS DIVISION,

Plaintiff,

Index No.: 101357/07

-against-

**DECISION  
and  
ORDER**

AVROHOM M. SCHWEBEL, a/k/a, AVI SCHWEBEL,  
ALAN FRIEDMAN, LEONARD FRIEDMAN, VOLVI  
LOWY, a/k/a, WILLIAM LOWY & IRWIN JACOBS,

Defendants.

-----X  
IRWIN JACOBS,

Third-Party Plaintiff,

-against-

Index No.: 590490/07

TIMING GROUP INC., J.C. PENNY CO., INC.,  
MORRIS ABOUDI, BRISTOL FOOTWEAR, INC.,  
REITZ MANAGEMENT CO., INC., VICTORY  
INTERNATIONAL TRADING, INC.,

Third-Party Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

This action seeks to collect from guarantors of a factoring agreement by which plaintiff loaned \$1,779,412.40 to Timing Group, LLC ("Timing"). Pursuant to the separate Guarantees, the guarantors jointly and severally guaranteed the loan. The liability of Schwebel and the Friedmans was limited to \$1,000,000. Similarly, the liability of Lowy and the liability of Jacobs, each, was limited to \$1,000,000. Jacobs, in his answer, alleged, *inter alia*, fraudulent conduct on the part of: 1) his co-defendants; 2) Reitz Management Co., Inc. ("Reitz") and Victory International Trading, Inc. ("Victory"), companies in which his co-defendants had an interest ; 3) plaintiff; 4) other companies -- Bristol Footwear, Inc. ("Bristol"), Morris Abboudi ("Abboudi")

and Classique Footwear, Inc. ("Classique"); and 5) J.C. Penny Co., Inc. ("JCP"), a customer of Timing. In addition, Jacobs filed a third party complaint against Timing, JCP, Abboudi, Bristol, Classique, Reitz and Victory.

In May 2007, Alan Friedman filed a Chapter 7 bankruptcy petition in California. In that petition, his assets were listed as under \$100,000 and his debt to secured creditors was listed as \$2,750,000. This court stayed the proceedings in light of this bankruptcy filing. Plaintiff now moves to sever the claims against Alan Friedman from the remaining action and, thereby, lift the stay against the remaining parties.

In support of its motion, plaintiff contends that the non-bankrupt defendants would not be prejudiced by the severance and that delay would prejudice it by allowing these remaining defendants to hide their assets. Also, it argues that the guarantees of all of the defendants are absolute and unconditional, that the bankruptcy estate has no assets and, therefore, waiting for completion of the bankruptcy is to no avail. Finally, it contends that Jacobs' cross-claims do not militate against severance, since any claim against Alan Friedman may be brought by him later and any claim for his indemnification against Alan Friedman is independent from each defendant's liability to plaintiff.

Jacobs opposes severance. He argues that where a co-debtor has an indemnification claim against the bankrupt, severance is not appropriate, citing to *Branham v. Loews Orpheum Theatre, Inc.*, 291 A.D.2d 356 (1st Dept. 2002). He claims that he has asserted an indemnification claim against the bankrupt by contending that Alan Friedman aided and abetted co-defendant Schwebel in looting Timing. He further alleges that plaintiff, in a separate action, elicited testimony from Alan Friedman at a deposition in which he stated that he acted as

Timing's representative in connection with the factoring agreement and with IDB's knowledge submitted a false financial statement in order that IDB could offer Timing an uncollateralized loan. He, then, argues that Alan Friedman is a necessary party.

Plaintiff, in reply, states that it never deposited Alan Friedman and that it never offered or gave Timing an uncollateralized loan. Moreover, it points out that there is no indemnification agreement between Jacobs and Friedman and that Jacobs' personal guarantee is independent of his claims against Friedman.

CPLR 603 provides that a court may sever claims in a case "[i]n furtherance of convenience or to avoid prejudice." The granting of a severance is in the court's discretion. *Rosenbaum v. Dane & Murphy, Inc.*, 189 A.D.2d 760, 761 (1<sup>st</sup> Dept. 1993).

Here, the issue devolves around the magnitude of an automatic bankruptcy stay. As noted by the First Department in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Oxford Venture Partners, LLC*, 13 A.D.3d 89 (1st Dept. 2004): "It is well settled law that '[t]he automatic stay provisions of the Federal bankruptcy laws...do not extend to nonbankrupt codefendants.'" See also *Branham, supra*; *Rosenbaum, supra*; *Cashman v. Montefiore Medical Center*, 191 B.R. 558, 561 (1996). Nor do the circumstances in the instant case give rise to an exception to this rule.

A bankruptcy stay will be extended to non-debtors only under unusual circumstances. *Merrill Lynch, supra*. Thus, "when there is such identity between the [bankrupt] and the third-party defendant that the [bankrupt] may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the [bankrupt]," an exception to the general rule exists. *A.H. Robins Co. v. Piccinnin*, 788 F.2d 994, 999 (4th Cir. 1986). An example of such circumstance would be a suit against a third-party who

is entitled to absolute indemnity by the bankrupt or where liability against the third-party would be imputed to the bankrupt debtor by law. *Id.* at 999-1000.

Here, Jacobs is not indemnified by Alan Friedman. A fraud action is different from indemnification. Further, Jacobs and Friedman signed separate guarantees. Were Jacobs or any of the defendants found liable, Alan Friedman would not be vicariously liable. Accordingly, it is.

ORDERED that the claims and cross-claims against Alan Friedman are severed from the remainder of the instant action; and it is further

ORDERED that the caption in the main action shall be:

-----X  
ISRAEL DISCOUNT BANK OF NEW YORK, IDB  
FACTORS DIVISION,

Plaintiff,

Index No.: 101357/07

-against-

AVROHOM M. SCHWEBEL, a/k/a, AVI SCHWEBEL,  
LEONARD FRIEDMAN, VOLVI LOWY, a/k/a,  
WILLIAM LOWY & IRWIN JACOBS,

Defendants.

-----X  
And it is further

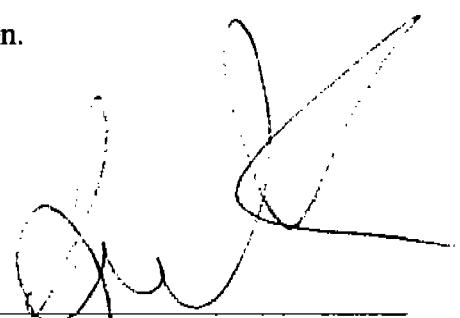
ORDERED that all stays in regard to Avrohom Schwebel, Leonard Friedman, Volvi Lowy, irwin Jacobs, Timing Group, Inc., J.C. Penny Co., Inc., Morris Abboudi, Bristol Footwear, Inc., Reitz Management Co., Inc. and Victory International Trading, Inc., are lifted; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties, as well as, the Trial Support Office (Room 158) and the County Clerk so that their

records may be altered to reflect the changes in the caption.

ENTER

Date: January 22, 2008

  
\_\_\_\_\_  
J.S.G.

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERKS OFFICE