

Taub v Kaplan

2008 NY Slip Op 30579(U)

February 21, 2008

Supreme Court, Nassau County

Docket Number: 2553-06/

Judge: Leonard B. Austin

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INDEX
No. 12553-06

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

**Motion R/D: 1-29-08
Submission Date: 2-13-08
Motion Sequence No.: 009/MOT D**

DAVID TAUB and MARC TAUB,

Plaintiffs,

- against -

**RICHARD KAPLAN, THE H. COMPANY,
LTD. and PRK STORES LLC,**

Defendants,

**COUNSEL FOR PLAINTIFFS
Sawyer, Halpern & Demetri, Esqs.
666 Old Country Road - Suite 701
Garden City, New York 11530**

**COUNSEL FOR DEFENDANTS
(Outgoing)
Levy & Schneps, P.C.
1615 Northern Boulevard
Manhasset, New York 11030**

**(Incoming)
Fogel & Wachs, P.C.
31 Edgewood Avenue
Larchmont, New York 10538**

ORDER

The following papers were read on the motion of Levy & Schneps, P.C. to withdraw as attorneys for Defendant Richard Kaplan and to retain money in escrow pending resolution of a fee dispute:

- Order to Show Cause dated January 7, 2008;
- Affirmation of Michael A. Levy, Esq. dated December 26, 2007;
- So-Ordered Stipulation dated January 29, 2008;
- Letter of Michael A. Levy, Esq. dated February 11, 2008.

TAUB v. KAPLAN, *et al.*
Index No. 12553-06

Levy & Schneps, P.C. moves for leave to withdraw as attorneys for the defendant, Richard Kaplan ("Richard") and to retain money in escrow pending resolution of its fee dispute with Richard.

BACKGROUND

Levy & Schneps, P.C. represented Richard in connection with five actions; to wit:

1. David Taub and Marc Taub v. Richard Kaplan, The H Company, Ltd. and PRK Stores, LLC, Supreme Court, Nassau County, Index No. 12553/06
2. David Taub and Marc Taub v. PRK Stores, LLC and Richard Kaplan, Supreme Court, Nassau County, Index No. 12434/07
3. David Taub and Marc Taub v. Richard Kaplan, Priscilla Kaplan, Rhonda Hamilton and PRK Stores, LLC (as nominal respondent), Supreme Court, Nassau County, Index No. 17726/07.
4. David Taub and Marc Taub, as Directors on behalf of and for the benefit of The H Company, Ltd. v. Richard Kaplan and The H Company, Ltd. (as a nominal defendant), Supreme Court, Nassau County, Index No. 16984/07; and
5. Priscilla M. Kaplan v. Richard Kaplan, Supreme Court, Nassau County, Index No. 18593/06.

The first four of these actions involve the operation of businesses in which Kaplan was either a member of the limited liability company that owned the business or a shareholder in the corporation that owned the business ("Business Actions"). Action

TAUB v. KAPLAN, *et al.*
Index No. 12553-06

number 5 was a matrimonial action in which Priscilla Kaplan sought a divorce from Richard and ancillary relief including equitable distribution of the marital property.

The matrimonial action and the Business Actions were interrelated and overlapped because Priscilla Kaplan was, or claimed to be, a shareholder in or a member of The H Company, Ltd. and PRK Stores, LLC.

All of the actions were resolved after prolonged negotiations and mediation with the assistance of Special Referee Frank Schellace. The settlement of these actions was incorporated into a Stipulation of Settlement dated November 14, 2007 ("Stipulation").

In addition to settling the Business Actions, the settlement provided for a resolution of the matrimonial action which resulted in Priscilla Kaplan being granted a divorce from Richard Kaplan.

As part of the settlement of these actions, the sum of \$1,195,327 was paid into Levy & Schneps, P.C.'s escrow account to be distributed upon the completion of the closing requirements contained in the Stipulation. Levy & Schneps, P.C. was required to retain \$45,000 in escrow to be released at a later time.

By December 19, 2007, Levy & Schneps, P.C. had been able to obtain the consent of the other parties attorneys to the release of \$1,000,000 to Richard. Richard objected to some of the terms of the agreement that permitted this money to be released to him and refused to sign the agreement that would have permitted the

TAUB v. KAPLAN, *et al.*
Index No. 12553-06

release of these funds. At that time, Richard began to communicate and negotiate directly with Taubs' attorney regarding the terms of the release of funds being held in escrow by Levy & Schneps, P.C. In addition, Richard indicated that he had no intention of paying the outstanding balance due for services rendered to him by Levy & Schneps, P.C.

Levy & Schneps, P.C. now moves for an order granting it leave to withdraw as Richard's attorney in the aforementioned actions and to retain money in escrow pending the resolution of its fee dispute with Richard.

On the return date of the order to show cause, January 29, 2008, Stuart Wachs, Esq. of the firm of Fogel & Wachs, P.C., appeared on behalf of Richard and executed a stipulation on behalf of Richard permitting Levy & Schneps, P.C. to withdraw as Richard's attorney in the above-captioned actions. The Stipulation was "So Ordered" by this Court.

The motion was adjourned to February 13, 2008 to permit Richard's incoming attorneys to submit papers in regard to the fee dispute and the Levy & Schneps request to hold money in escrow pending resolution of the fee dispute and to permit Levy & Schneps to submit reply papers.

By letter dated February 11, 2008, Michael Levy, Esq. of Levy & Schneps advised the Court that Richard would not be submitting papers in opposition to the

motion. However, the letter attached a copy of an e-mail sent by Stuart Wachs to Michael Levy indicating Richard disagreed with the billing and disputed the fee.

DISCUSSION

Based upon the January 29, 2008 Stipulation, the portion of the motion in which Levy & Schneps, P.C. seeks leave to withdraw as attorneys for Richard in the above-mentioned actions has been rendered moot.

In any event, based upon what is clearly a deterioration of the attorney-client relationship, Levy & Schneps, P.C. would have been granted leave to withdraw as Richard's attorney in these actions. 22 NYCRR 120.15 (c)(i)(iv) [DR 2-110 (c)(i)(iv)]. See, Winter v. Rise Steel Erection Corp., 231 A.D. 2d 62 (2nd Dept. 1996).

An attorney is required to promptly refund to a client any portion of a fee paid in advance that has not been earned. 22 NYCRR 120.15(a)(3) [DR2-110(a)(3)]. To the extent that the fee paid to date by Richard is excess of the amount properly due and owing in accordance with Richard's agreement with Levy & Schneps, the overpayment would have to be refunded. See, Matter of Hirsch, 226 A.D.2d 41 (1st Dept. 1996); and Matter of Horak, 224 A.D.2d 47 (2nd Dept. 1996).

The prompt resolution of the fee dispute is in the best interest of Richard and Levy & Schneps, P.C. Therefore, the Court respectfully refers this matter to Special Referee Frank Schellace to hear and determine all issues in regard to the fee dispute between Richard and Levy & Schneps, P.C.

[* 6]
TAUB v. KAPLAN, *et al.*
Index No. 12553-06

Levy & Schneps, P.C. is holding money due to Richard in escrow. Based upon the averments contained in the affirmation of Michael Levy, Esq. submitted in support of this motion, Levy & Schneps, P.C. should be directed to hold the sum of \$100,000 in escrow pending the hearing and determination of the fee dispute; to wit: the sum of \$55,000 in connection with the fee dispute and the sum of \$45,000 for distribution in accordance with the terms of the stipulation. This amount should be sufficient to assure that Levy & Schneps is paid the fee it claims is due and owing. Distribution of the other money, if any, still being held in escrow for Richard's benefit is contingent upon obtaining all the necessary approvals for the release of that money in accordance with the terms of the Stipulation.

Accordingly, it is,

ORDERED, that the motion of Levy & Schneps, P.C. for leave to withdraw as attorneys for Richard Kaplan is **denied** as moot in accordance with the terms of a Stipulation dated January 29, 2008; and it is further,

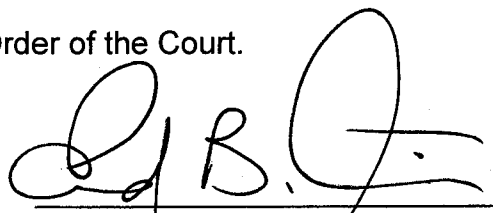
ORDERED, that the fee dispute between Richard Kaplan and Levy & Schneps, P.C. is respectfully referred to Special Referee Frank Schellace on March 25, 2008 at 9:30 a.m. to hear and determine all issues relating to the proper sum due and owing to Levy & Schneps, P.C. for the fees it has earned; and it is further,

TAUB v. KAPLAN, *et al.*
Index No. 12553-06

ORDERED, that Levy & Schneps, P.C. shall retain in escrow, from money it is presently holding for the benefit of Richard Kaplan, the sum of \$100,000 pending the hearing and determination of the fee dispute subject to further order of this Court or the Special Referee.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
February 21, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

FEB 26 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**