

Taub v Kaplan

2009 NY Slip Op 30658(U)

March 16, 2009

Supreme Court, Nassau County

Docket Number: 12553-06

Judge: Leonard B. Austin

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SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 11 NASSAU COUNTY

PRESENT:
 HONORABLE LEONARD B. AUSTIN
 Justice

Action #1 - 12553-06
 _____ x
 DAVID TAUB and MARC TAUB,

 Plaintiffs,

 - against -

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

 Defendants,

-----X
 Action # 2 - 12434-07
 _____ x
 DAVID TAUB and MARC TAUB,

 Plaintiffs,

 - against -

PRK STORES LLC, RICHARD
 KAPLAN,

 Defendants,
 -----X

Motion R/D: 3-5-09
 Submission Date: 3-5-09
 Motion Sequence No.: 012/MOT D

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 MATRIMONIAL ACTION
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Action # 3 - 18593-06

PRISCILLA S. KAPLAN, X

Plaintiff,

- against -

RICHARD S. KAPLAN,

Defendant

-----X
Action # 4 - 17726-07

DAVID TAUB and MARC TAUB, X

Petitioners,

- against -

RICHARD S. KAPLAN, PRISCILLA KAPLAN, RHONDA HAMILTON and VESNA MILOCIC,

- and -

PRK STORES LLC,

Nominal Respondents.

-----X
Action # 5 - 15984-07

DAVID TAUB and MARC TAUB, as Directors on behalf of and for the benefit of the H COMPANY, LTD. X

Plaintiffs,

- against -

RICHARD KAPLAN, and THE H COMPANY, LTD. (as a nominal defendant)

Defendants,

-----X

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ORDER

The following papers were read on the motion of Stuart Wachs, Esq. and Fogel & Wachs, PC to be relieved as counsel of record for Richard S. Kaplan and PRK Stores LLC:

Order to Show Cause dated February 20, 2009;
Affirmation of Stuart Wachs Esq. dated February 18, 2009;
Affirmation of James Sawyer, Esq. dated March 5, 2009.

Pursuant to CPLR 321(b)(2), Fogel & Wachs, P.C. ("F&W") and Stuart Wachs ("Wachs") move for leave to withdraw as attorney of record for the Defendants/ Respondents, Richard Kaplan ("Kaplan") and PRK Stores, LLC ("PRK") and for a stay of the proceedings to allow Kaplan and PRK time to retain new counsel.

BACKGROUND

This lawsuit involves five related actions which were all settled by a Stipulation of Settlement ("Stipulation"), dated November 13, 2007. In August 2008, David Taub, Marc Taub, and the H Company Ltd. ("H Co."), moved for an order directing entry of judgment pursuant to the Stipulation in this matter, and directing the Clerk of the Court to enter judgment in favor of H Co. and against PRK and Kaplan, in the sum of \$276,958.90 with interest from March 6, 2008¹. By order, dated January 13, 2009, this Court granted the motion for judgment against PRK and in the amount of \$276,958.90,

¹At the same time, Kaplan and PRK sought an order directing the appointment of an accountant to value H Co.'s ending inventory; payment of the accounting fees by the Taubs and Priscilla Kaplan; discovery regarding various items including the valuation method for the 2007 ending inventory of H Co.; and payment of all professional and attorneys' fees by the Taubs and Priscilla Kaplan.

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with interest from March 6, 2008².

On February 4, 2009, H. Co. commenced an action against Michael Kors Stores, L.L.C. ("MKS"), PRK, Kaplan, Wachs and F&W in this Court under Index No. 1960/09 ("2009 Action"). The 2009 Action has been assigned to Justice Stephen A. Bucaria. In the 2009 Action, H. Co. alleges that, on March 22, 2007, MKS executed a promissory note ("Note") in the sum of \$666,666.67 payable to PRK. On December 3, 2007, PRK, by Kaplan, executed a Partial Assignment of Note Payment Obligation and executed a Notice of the Partial Assignment on January 7, 2008. PRK commenced litigation against MKS in Supreme Court, New York County under Index Number 601905/08 ("NY County Action"). According to a settlement agreement, dated November 3, 2008, MKS agreed to pay PRK \$371,000 before November 7, 2008. The payment to PRK purportedly fully satisfied MKS's obligations under the March 22, 2007 Note.

MKS was to pay the \$371,000 to PRK by wire transfer to Wachs's JP Morgan Chase Bank IOLA account. H. Co. alleges that payment of those funds pursuant to the settlement agreement violated MKS's obligations under the Partial Assignment of Note Payment Obligation and Notice of same since MKS was obligated to pay \$276,958.90 to H. Co.

In its second cause of action in the 2009 Action, H. Co. alleges that Wachs and F&W represented PRK in the NY County Action and that Wachs and F&W were aware of the terms of the Stipulation, the Partial Assignment and the Notice of the Partial

² By the same order, the Court denied the motion of Kaplan and PRK.

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Assignment. H. Co alleges that Wachs and F&W colluded with PRK and Kaplan in negotiating and executing the settlement agreement pertaining to the NY County Action. Specifically, the NY County Action settlement agreement reads that "PRK has not sold, pledged, assigned, transferred, conveyed or otherwise disposed of any of its claims or any other claims, demands, obligations or causes of action referred to in this Agreement." (2009 Action, Complaint ¶ 23). The NY County Action settlement agreement also states that PRK is the holder of the Note between PRK and MKS and that the Note has not been assigned to any person or entity. H. Co. alleges that despite Wachs and F&W having knowledge of the terms of the Stipulation in the underlying litigation, Wachs and F&W disbursed the \$371,000 received from MKS even though \$276,958.90 was to go to H. Co. Thus, H. Co. seeks \$276,958.90 from Wachs, F&W, PRK and Kaplan, in addition to punitive damages.

For the third cause of action, H. Co. asserts that Wachs, F&W, PRK and Kaplan intentionally caused MKS to breach its contractual obligations to H. Co.

Wachs and F&W now move to be relieved as counsel in this action given the allegations in the 2009 Action that they have wrongfully diverted money which belonged to H. pursuant to Code of Professional Disciplinary Rule Responsibility ("DR") 5-191.

In connection with the judgment, H. Co. issued subpoenas, dated February 5, 2009, for deposition testimony and documents to PRK, Kaplan, RS Kaplan and Associates, LLP, RS Kaplan, CPA, P.C., Plum Shoppes, LLC, Wachs and F&W. Pursuant to the subpoenas, depositions were scheduled for February 27, 2009 and

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March 20, 2009. Wachs and F&W maintain that H. Co has refused to adjourn the deposition dates in the subpoenas. As a result, Wachs and F&W request a 30 day stay of the subpoenas from the date of service so that Kaplan and PRK can obtain new counsel. This Court granted Kaplan and PRK's request for a stay of all proceedings in the five consolidated actions except for proceedings in the matrimonial action between Priscilla S. Kaplan and Richard S. Kaplan.

In response to the motion, the Taubs and H. Co. request that any stay of the proceedings be limited to two weeks.

There is no opposition to Wachs's and F&W's request to be relieved as counsel.

DISCUSSION

A. Leave to Withdraw

Under CPLR 321(b)(2), an attorney of record may be removed from a case by an order of the court in which the action was brought. The attorney must show good cause for withdrawal. 22 NYCRR 1200.15(c)(6) DR 2-110(c)(6). The decision to grant or deny permission to withdraw lies within the discretion of the trial court. Matter of Khan v. Dolly, 39 A.D.3d 649, 650 (2nd Dept. 2007).

According to DR 5-101 (22 NYCRR 1200.20):

(a) A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe

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that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

"Doubts as to the existence of an asserted conflict of interest are to be resolved in favor of disqualification." Narel Apparel Ltd, Inc. v. American Ultex Intern., 92 A.D.2d 913 (2nd Dept. 1983).

Where an attorney will likely be called as a key witness in the case against his clients, fellow co-defendants, and, as a defendant, the attorney's defense may be adverse to that of his clients, the attorney should no longer remain as counsel to those clients. See, Guiliano v. Carlisle, 211 A.D.2d 757, 758 (2nd Dept. 1995). Likewise, the "advocate-witness" rule requires an attorney to withdraw from a case where it is likely that he will be called as a witness. DR 5-102 (22 NYCRR 1200.21). Since, the Taubs and H. Co. have subpoenaed Wachs and F&W for examinations before trial in this action and Wachs and F&W are co-defendants with their former clients in the 2009 Action, which is related to this litigation, it is appropriate to grant the motion of Wachs and F&W to be relieved as counsel for Kaplan and PRK.

Accordingly, it is,

ORDERED, that the motion of Stuart Wachs and Fogel & Wachs, P.C. for leave to withdraw as attorneys of record for Richard S. Kaplan and PRK Stores, LLC is **granted**; and it is further,

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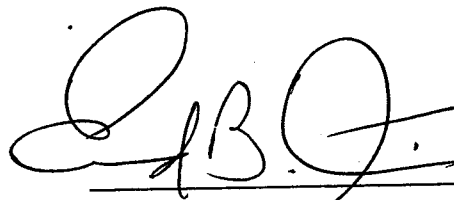
ORDERED, that a copy of this Order with Notice of Entry together with a Notice to Appoint Another Attorney as provided for by CPLR 321(c) shall be served upon Richard S. Kaplan pursuant to CPLR 308 (1) or (2), upon PRK Stores, LLC pursuant to CPLR 311-a and upon the attorney for David Taub, Marc Taub, and the H Company Ltd. pursuant to CPLR 2103(b)(2); and it is further

ORDERED, that no proceedings in this action shall be taken against the Richard S. Kaplan and PRK Stores, LLC without permission of the Court for a period of 14 days following the date of this Order; and it is further

ORDERED, that incoming counsel for Defendants and counsel for Plaintiffs shall appear for a status conference on April 10, 2009 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
March 16, 2009



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

ENTERED

MAR 19 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE