

**Siegel v Jackson Siegel Aaron, Ltd.**

2010 NY Slip Op 32916(U)

October 5, 2010

Sup Ct, NY County

Docket Number: 102717/06

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

Stephen Miller Siegel, et al.,

INDEX NO. 102717/06

Petitioner,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 005

Jackson Siegel Aaron, LTD., et al.,

MOTION CAL NO. \_\_\_\_\_

Respondents.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

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

Answering Affidavits- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: \_\_\_\_\_ YES \_\_\_\_\_ NO

**FILED**  
OCT 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/5/10

  
\_\_\_\_\_  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION \_\_\_\_\_ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----X  
In the Matter of:

The Application of Stephen Miller Siegel, holder of  
forty-five percent (45%) of all outstanding shares of  
JACKSON SIEGEL AARON LTD.,

Petitioner,

**DECISION & ORDER**

For the Dissolution of

Index No. 102717/06

JACKSON SIEGEL AARON LTD., a New York  
Corporation, pursuant to BCL § 1104-a and LISA  
JACKSON and CATHERINE AARON,

Respondents.

**FILED**  
OCT 15 2010  
NEW YORK  
COUNTY CLERKS OFFICE

-----X  
**MILLS, DONNA, J.:**

Petitioner, Stephen Miller Siegel (Siegel) moves for an order confirming in part and  
rejecting in part the April 29, 2010 report of Special Referee Lancelot Hewitt, appointed to hear  
and report pursuant to this court's July 10, 2007 order. Respondents Jackson Siegel Aaron Ltd.  
(JSA), Lisa Jackson (Jackson) and Catherine Aaron (Aaron) cross-move to confirm in part and  
reject in part that same referee's report.

**BACKGROUND**

In 1992, Seigel, an architect, formed Stephen Miller Siegel Architects (SMSA), a  
corporation which performs architectural and interior design services for private clients. In 2003,  
Siegel, Jackson and Aaron formed JSA, an interior design and decorating business. Prior to  
JSA's formation, Jackson and Aaron had operated a separate company, Jackson Aaron (JA),  
which also provided interior design and decorating services. Although SMSA remained a

separate company, it moved into the offices that JA occupied at 306 East 61<sup>st</sup> Street in New York City. Thereafter, JSA occupied 50% of the office space while SMSA occupied the remaining 50%. At the time of the move, SMSA transported furniture, bookcases, shelving, desks, a computer, file cabinets, other office equipment and more than 100 bins of fabric samples from its old office into the 61<sup>st</sup> Street office space.

Although the parties did not reduce their agreement to writing, it is undisputed that Siegel, a 45% owner of JSA, Jackson, a 45% owner of JSA and Aaron, a 10% owner, agreed that all interior design and decorating services previously provided by JA or SMSA would, going forward, be provided by JSA. However, the parties also agreed that JA would complete work on two existing contracts with clients known as the Kerpens and the Battistas, and they agreed that SMSA would, when necessary, provide architectural services to JSA's clients.

In February 2006, Siegel filed a petition to dissolve JSA on the grounds that: 1) despite the parties' agreement, Jackson and Aaron continued to operate JA out of JSA's offices for their own personal benefit; 2) on February 9, 2006, without notice, Jackson and Aaron locked Siegel out of JSA's office and told him that he no longer had any role with JSA; and 3) that Jackson and Aaron seized control and deprived Siegel of his personal property and SMSA's property (Berman Aff., Ex. B).

Siegel requested injunctive relief restraining JSA from transacting unauthorized business and from transferring or conveying JSA's assets. On March 14, 2006, the parties entered into a stipulated order permitting Jackson and Aaron to operate JSA to protect its assets and preserve the status quo; to expend JSA's assets for business-related expenses in the ordinary course of business, and prohibiting Jackson and Aaron from entering into any new contracts on behalf of JSA or wasting or misappropriating JSA's assets (Berman Aff., Ex. C).

By the decision and order of this court dated July 10, 2007, all outstanding issues in this matter were referred for assignment to a Special Referee to hear and report with recommendations and on July 13, 2007, the court ordered the parties to submit a joint list of issues to be presented to the referee. Accordingly, the issues presented to the referee were plaintiff's claims for: (1) diversion of business opportunities; (2) treble damages for wrongful eviction; and (3) the return of Seigel/SMSA property, as well as the return of JSA property that Jackson had allegedly converted to her personal use. Respondents also sought attorneys' fees.

A hearing was held before the referee on these issues and on April 29, 2010, the referee filed his report (Berman Aff., Ex. A). In his report, the referee found that, based on evidence presented:

- a) Jackson and Aaron breached their fiduciary duty by diverting business opportunities from JSA to JA. Specifically, he found that the interior design services rendered by JA to the Kerpens and Battistas, after 2003, were not in the nature of the completion of any prior executory contracts. Based on this finding, the referee recommended that petitioner be awarded damages in the amount of \$276,187.88, representing the total sum of the invoices generated by JA to the Kerpin and Battista accounts, during the period from January 2004 through September 2005.
- b) The interior design services provided by JA to Hess and Schenker did not violate the parties' agreement and did not amount to the diversion of a business opportunity, given that JSA was initially retained to provide the services and that JA was retained only after JSA was being dissolved.
- c) Siegel was wrongfully evicted from the JSA offices in February 2003 but that, even though Siegel was wrongfully evicted, he failed to provide any evidence of actual damages resulting from the eviction and, therefore, treble damages were not warranted.
- d) Neither party was entitled to attorneys' fees because Siegel, as "prevailing party" did not offer any proof of billing for services rendered and respondents were not entitled to fees because they were not "the prevailing party."
- e) Siegel was entitled to the return of property items identified as #s 23, 50, 51, 54, 56, 73 and 76, but that he failed to provide sufficient evidence for the return of the other

enumerated items.

(Berman Aff., Ex. A).

Petitioner now moves to confirm that portion of the referee's report that finds: 1) that Jackson and Aaron diverted the Kerpen and Battista accounts to JA and that recommends damages in the amount of \$276,187.88; 2) that respondents wrongfully withheld property that belonged to Siegel or SMSA; and 3) that Siegel and SMSA were wrongfully evicted from JSA's office.

Petitioner moves to reject the portions of the report that find that Jackson and Aaron did not divert the Hess and Kerpen accounts from JSA to JA; that Siegel failed to present sufficient evidence that he was entitled to the return of all the enumerated items; and the portion of the report that found that he was not entitled to treble damages for wrongful eviction.

In their cross motion, respondents seek an order confirming that portion of the referee's report that found that they did not wrongfully divert the Hess and Schenker accounts from JSA to JA; that petitioner put forth no evidence that would entitle him to treble damages for wrongful eviction; and that certain of the enumerated property items are the property of JSA.

Respondents seek to reject the portion of the referee's report that found that Jackson and Aaron diverted business opportunities with respect to the Kerpen and Battista accounts and that petitioner is entitled to damages for such alleged diversion; that JSA wrongfully evicted Siegel from JSA's offices and that certain items of property should be returned to Siegel. In addition, respondents claim that the report made no finding with respect to their argument that Siegel did have standing to assert a wrongful eviction claim on behalf of SMSA and that the report failed to address JSA's entitlement to its dissolution-related attorneys' fees.

## DISCUSSION

“It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility, since the Special Referee is considered to be in the best position to determine the issues presented” (*Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997][internal citations omitted]).

In this case, the record supports the referee’s finding that Jackson and Aaron unlawfully diverted the Kerpen and Battista accounts from JSA to JA from January 2004 through September of 2005, in breach of their fiduciary duty (Pet. Exs. 6A, 7, 19). However, respondents correctly assert that the measure of damages for the diversion of a business opportunity by a fiduciary should be the net profit that JSA would have made but for the fiduciary’s unlawful diversion, not the lost gross profits that included pass through costs such as the cost of furniture and shipping that were paid for by the clients (*Robert Brian Associates, Inc. v Loews Theatres, Inc.*, 71 AD2d 594 [1<sup>st</sup> Dept 1979]; *McRoberts Protective Agency, Inc v Lansdell Protective Agency, Inc.*, 61 AD2d 652, 655 [1<sup>st</sup> Dept 1978]; *see also Tarantino v Kane*, 2 AD3d 1444 [4<sup>th</sup> Dept 2003]). Because the referee awarded damages based on lost gross profits, that branch of the referee’s report assessing damages for the diversion of the Kerpen and Battista accounts must be modified to encompass only the net profits that JSA would have realized but for the unlawful diversion, and the matter is remanded to the referee for a calculation of those net profits (*Shibolet v Yerushalmi*, 58 AD3d 407 [1<sup>st</sup> Dept 2009]).

The record also supports the referee’s findings that the Hess and Schenker accounts were not improperly diverted from JSA to JA because the evidence demonstrates that JA was only

retained by these clients after JSA had begun dissolution. Indeed, Schenker cancelled her contract with JSA effective June 14, 2006 and Hess cancelled her contract on February 6, 2006 (Pet. Ex. 11, 12; Res. Ex. I, J). Moreover, all money owed by Schenker and Hess to JSA was paid to JSA.

In addition, the referee properly found that the credible evidence established that petitioner was only entitled to the return of property items numbered 23, 50, 51, 54, 56, 73 and 76 (Res. Hearing Ex. H; Pet. Hearing Ex. 1-A, 1-B; 1/26 Trans., at 16-22, 29-30) (*see Spangenberg v Chaloupka*, 229 AD2d 482, 484 [2d Dept 1996]). The referee had the opportunity to listen, observe and evaluate both the relevant evidence and testimony of the witnesses, and his determination that petitioner did not provide sufficient evidence for the return of items 30, 49, 57, 58, 59, 60, 62, 63, 64, 71, 77, 78, 80 and 81 will not be disturbed (*see Matter of Frances W. v Steven M.*, 15 Misc 3d 839, 843 (Fam Ct Queens County 2007)).

As to attorneys fees', JSA's "Stipulated Plan of Orderly Dissolution" states that "[a]ll expenses incurred to implement and administer the Liquidation Plan shall be paid from the Liquidation Account . . . including the cost of contractors, administrators, accountants, and attorneys acting on behalf of the Corporation or its Authorized Officers" (MacAvoy Aff., Ex. S at 16). Petitioner does not dispute that JSA is entitled to pay its dissolution related attorneys' fees from the liquidation account. Accordingly, the branch of the referee's report finding that none of the parties is entitled to an award of legal fees must be modified to reflect the parties' stipulated liquidation agreement and to award dissolution related legal fees to JSA. The question of attorneys' fees is remanded to the referee for a calculation of the reasonable dissolution-related legal fees incurred by JSA.

Moreover, as to the wrongful eviction claim, the referee's finding that Siegel and SMSA were wrongfully evicted from JSA's office must be set aside because Siegel had no standing to bring this claim on behalf of the corporation. An injury to a corporation that incidentally injures a person affiliated with the corporation, including a sole shareholder, "does not confer on the individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation" (*Saxe, Bacon & Bolan, P.C. v Martindale-Hubbell, Inc.*, 521 F Supp 1046, 1048 [SD NY 1981]; *see also Schwartz v Nordstrom, Inc.*, 160 AD2d 240, 241 [1<sup>st</sup> Dept 1990]).

In its post-hearing memorandum, petitioner admits that SMSA was the occupant of the premises (Petitioner's Post-Hearing Memorandum, at 10-11). SMSA is not a party to this proceeding and Siegel, as SMSA's sole shareholder, does not have standing to bring a wrongful eviction claim, in this proceeding, on behalf of the corporation. Accordingly, the wrongful eviction claim is dismissed as a matter of law.

Therefore, it is ORDERED that petitioner Steven Miller Siegel's motion to confirm in part and reject in part the April 29, 2010 referee's report is granted to the extent that the referee's findings that 1) respondents diverted the Kerpen and Battista accounts during the period from January 2004 through September 2005; and 2) that petitioner is entitled to the return of property items numbered 23, 50, 51, 54, 56, 73 and 76 are confirmed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that respondents Jackson Siegel Aaron Ltd, Lisa Jackson and Catherine Aaron's cross motion to confirm in part and reject in part the April 29, 2010 referee's report is granted to the extent that the referee's finding that the Hess and Schenker accounts were not improperly diverted from Jackson Siegel Aaron to Jackson Aaron is confirmed; and it is further

ORDERED that respondents' request to reject portions of the April 29, 2010 referee's report is granted to the extent that petitioner's illegal eviction claim is dismissed as a matter of law; and it is further

ORDERED that and the question of dissolution-related attorneys' fees is remanded to the referee to hear and report on the amount of Jackson Siegel Aaron's reasonable dissolution-related legal fees; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119-M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of Special Referee Lancelot Hewitt, to hear and report as specified above; and it is further

ORDERED that the cross motion is otherwise denied.

DATE: 10 / 5 / 10

**FILED**  
OCT 15 2010  
NEW YORK  
COUNTY CLERKS OFFICE

ENTER:

  
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J.S.C.  
DONNA M. MILLS, J.S.C.