

**Taub v Tokayer**

2011 NY Slip Op 31347(U)

May 17, 2011

Supreme Court, New York County

Docket Number: 116878/2009

Judge: Marcy S. Friedman

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

PRESENT: FRIEDMAN  
**MARCY S. FRIEDMAN** Justice

PART 57

REUBEN TAUB  
- v -  
JRA DANIEL TOKAYER

INDEX NO. 116878/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 4  
MOTION CAL. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED	
1	_____
2-5	_____
6, 7	_____

*Memos of Law M1-M4*

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion and cross-motion are

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

MAY 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/17/11

[Signature]  
**MARCY S. FRIEDMAN** C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

**FILED**

**MAY 20 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
REUBEN TAUB and HINDY TAUB, x

*Petitioners,*

Index No.: 116878/2009

- against -

IRA DANIEL TOKAYER, et al.,

DECISION/ORDER

*Respondents.*

\_\_\_\_\_  
x

In this turnover proceeding brought pursuant to CPLR 5225(b) and 5227, petitioners seek an order directing respondent Ira Tokayer, the prior attorney and escrow agent of non-party DVP Global Trading, LLC (DVP), to turn over to petitioners moneys held by Tokayer on behalf of DVP. Petitioners, in a prior action entitled Taub v DVP Global Trading, L.L.C. (Supreme Court, New York County, Index No. 602135/09 [underlying action]), obtained a judgment, entered on November 9, 2009 against DVP, in the amount of \$1,123,753.22. By prior order dated May 21, 2010, this court granted Richard O'Connell, Chapter 7 bankruptcy trustee of Arbco Capital Management, LLC (Arbco), leave to intervene in the instant proceeding.<sup>1</sup> Non-party Eric Rothner, member of DVP, moves for leave to intervene in the instant proceeding. New York City Marshal Stephen Biegel cross-moves for leave to intervene and for an order declaring that the Marshal's rights and interests in the escrow fund are superior to any claim of petitioners or any other party.

<sup>1</sup> By notice of removal dated March 16, 2010, the proceeding was removed to the United States District Court for the Southern District of New York for subsequent reference to the U.S. Bankruptcy Court in connection with the Arbco Capital Management LLC bankruptcy case. By order of the U.S. Bankruptcy Court dated August 27, 2010, the action was remanded to this court.

The following material facts are undisputed: Tokayer represented DVP in a prior action entitled Regensberg v Generic Trading of Philadelphia LLC [Generic], et al. (Supreme Court New York County, Index No. 111582/03 [DVP action]). The DVP action settled for \$485,000 pursuant to a settlement agreement between DVP and Generic on or about November 1, 2007. (Tokayer Aff., ¶ 3.)<sup>2</sup> Tokayer is holding those funds in escrow. (Id.)

Respondent O'Connell is the bankruptcy trustee for Arbco. It is undisputed that both DVP and Arbco were managed by non-party Hayim Regensberg. Proposed respondent Rothner is a member of DVP, with a 55% interest. The Taub petitioners issued an Execution, dated November 10, 2009, for funds held in escrow for the benefit of DVP. (Pet., Ex. B.) Marshal Biegel served a Levy and Demand with Execution, also dated November 10, 2009, upon Tokayer. (Id.)

Rothner moves for leave to intervene in this proceeding on the ground that he has a competing interest in the DVP funds. In particular, he argues that he invested three million dollars in DVP which, in turn, invested a portion of the funds in Generic; that Generic improperly traded with the funds; and that DVP brought an action against Generic which was settled for the \$485,000 that is the subject of this turnover proceeding. (Rothner Aff., ¶ 2.) Rothner further claims that after the lawsuit was commenced, DVP ceased operations, and Rothner agreed with Regensberg to finance the lawsuit "on the condition that any proceeds from the lawsuit be turned over to [Rothner]." (Id., ¶ 3.) Rothner also asserts that Tokayer was aware of the agreement between Rothner and Regensberg and sought his consent to enter into the settlement of the DVP action against Generic. (Id., ¶ 4.)

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<sup>2</sup> Tokayer served a paper denominated an Affirmation, rather than an Answer, to the Petition.

CPLR 5225(b) and 5227 both provide that “[t]he court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.” Rothner thus correctly contends that “[r]ival claimants to the assets or funds may be joined [in a turnover] proceeding so that the court may prioritize the competing interests.” (Matter of Nat. Union Fire Ins. Co. v Eland Motor Car Co., Inc., 85 NY2d 725, 729 [1995].) Here, however, Rothner’s claim that he has a superior interest is based solely on his conclusory assertion that he entered into the agreement with Regensberg to finance the Generic litigation in exchange for the recovery of any proceeds received from Generic. Rothner fails not only to submit any documentary evidence of the agreement but also to allege any details as to the circumstances (e.g., date and place) of the making of the agreement.

Rothner’s further claim that he is asserting a derivative claim on behalf of DVP is without merit. It is settled that under New York law a member of an LLC may bring a derivative suit on behalf of the corporation. (Tzolis v Wolff, 10 NY3d 100 [2008].) However, Rothner’s claim that he is suing for funds from the Generic litigation that are due DVP is plainly inconsistent with his claims that he personally is entitled to the funds based on his agreement with Regensberg.

To the extent that Rothner questions the bona fides of petitioners’ loan to DVP or otherwise challenges their default judgment, Rothner’s claims “constitute[] a collateral attack upon the money judgment, which cannot be litigated in a special proceeding pursuant to CPLR 5227.” (Vanderbilt Credit Corp. v Chase Manhattan Bank, NA, 100 AD2d 544, 546 [2d Dept 1984].)

Rothner’s motion to intervene will accordingly be denied based on his failure to assert a “viable defense” to petitioners’ claim. (Id.) However, the court takes judicial notice of court

computer records showing that Rothner has served a motion to vacate the default judgment in petitioners' favor, which has been scheduled for argument in the action in which the judgment was rendered. Determination of the petition should be held in abeyance pending determination of Rothner's motion. (See Tilden Fin. Corp. v Commisso, 118 AD2d 848 [2d Dept 1986].)

As to Marshal Biegel's motion, leave to intervene will be granted. The Marshal establishes that he has a statutory claim for poundage fees pursuant to CPLR 8012(b) and 8014. However, the Marshal has not yet served an Answer. In any event, his claim should also be held in abeyance pending determination of Rothner's motion to vacate the default judgment, as such determination may affect this court's determination as to which party is liable for the poundage fees. (See e.g. Estate of Randolfi v Ultissima Beauty Inst., Ltd., 182 AD2d 799 [2d Dept 1992].)

Finally, the court holds that further hearing should be had on the claims of the Trustee of the Arbco bankruptcy that DVP is an alter ego of Arbco, and that this issue precludes turnover of the DVP funds to petitioners. In so holding, the court notes that while the allegations in the Trustee's Answer are conclusory, the court has discretion, pursuant to CPLR 409, to order additional submissions. In addition, on February 3, 2011, the United States Bankruptcy Court in the Arbco matter declined to approve a settlement between the Taubs and the Trustee regarding the DVP funds that are the subject of the instant turnover proceeding. (Tr. at 16, Rothner Aff. In Further Support, Ex. B.) At the hearing, the parties shall address whether further submissions should be entertained, and the effect of the bankruptcy proceeding on the alter ego claims.

It is accordingly hereby ORDERED that the motion of Eric Rothner to intervene is denied; and it further

ORDERED that the cross-motion of Mashal Biegel for leave to intervene is granted to the

extent that it is

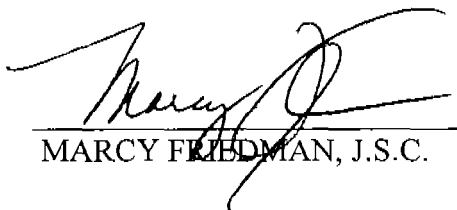
ORDERED that Marshal Biegel is granted leave to intervene in the instant proceeding as a party respondent, and that Marshal Beigel shall serve an Answer within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to amend the caption accordingly; and it further

ORDERED that the parties shall appear for further hearing on the issues identified in this decision on June 2, 2011, at 11:00 a.m. (Room 335, 60 Centre St.).

This constitutes the decision and order of the court.

Dated: New York, New York  
May 17, 2011



MARCY FRIEDMAN, J.S.C.

**FILED**

**MAY 20 2011**

NEW YORK  
COUNTY CLERK'S OFFICE