

**Akabas & Cohen v Cohen**

2014 NY Slip Op 31487(U)

June 9, 2014

Sup Ct, New York County

Docket Number: 160584/13

Judge: Richard B. Lowe III

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

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AKABAS & COHEN, a partnership in dissolution

Petitioner,

Index No. 160584/13

-against-

RICHARD B. COHEN,

Respondent.

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**Hon. Richard B. Lowe, III:**

In this special proceeding, Petitioner Akabas & Cohen (“A&C”) moves pursuant to CPLR §5225(c) for an order directing Respondent Richard Cohen (“Cohen”) to comply with this Court’s Judgement and Decision dated December 9, 2009 (the “judgment”) in the action titled *Richard B. Cohen v Akabas & Cohen* (Index No 103900/07). Respondent Cohen cross moves pursuant to CPLR § 3211(a)(1),(5), (7) and CPLR 404(a) for an order dismissing the petition. Respondent also seeks an order barring petitioner from commencing further litigation related to this matter without leave of this Court.

**Background**

This action is related to a previously filed litigation titled *Richard B. Cohen v Akabas & Cohen* (Index No 103900/07) (“prior action”). The prior action was a judicial accounting proceeding filed by Cohen after he withdrew from the A&C law firm. The protracted proceeding included two lengthy trials held before a special referee. The referee determined that Cohen’s departure from A&C invoked a dissolution and granted each of A&C’s partners an

equal interest in its dissolution date value. The referee found that A&C owed Cohen \$331,860.

A&C appealed and the Appellate Division unanimously affirmed the judgement (*see Cohen v Akabas & Cohen* 79 AD3d 460 [2010]). The Appellate Division specifically held

the Special Referee properly tallied the partnership's [A&C's] assets, deducted from the total amount of the outstanding liabilities, divided the remaining amount in accordance with each partner's relative interest in the partnership, and awarded plaintiff [Cohen] a money judgment against defendants, the remaining partners, in an amount representing the value of his interest in the partnership assets.

After the Appellate Division affirmed the judgment, A&C brought another proceeding, but this time against Cohen's new firm, Fox Rothchild LLP titled *Akabas & Cohen v Fox Rothchild* (Index No 600861/10) (the "Fox matter"). In a decision dated February 10, 2011, this court dismissed the complaint in its entirety. A&C appealed the dismissal of the Fox matter to the Appellate Division which unanimously affirmed the dismissal finding that the claims were barred by res judicata in light of the prior action (*see Akabas & Cohen v Fox Rothchild LLP* 89 AD3d 460 [2011]). Permission to appeal to the Court of Appeals was denied by both the Appellate Division and the Court of Appeals (*see Cohen Aff, Ex F; Akabas & Cohen v Fox Rothchild LLP* 19 NY3d 808 [2012])

A&C now brings this latest proceeding pursuant to CPLR 5225 purportedly seeking to enforce a judgment entered in the prior action. A&C argues that pursuant to a judgment it is still entitled to payment from Cohen for a fee Cohen received from a former client named Mednick. A&C also seeks to compel Cohen to remove his name from A&C's UBS security deposit account.<sup>1</sup>

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<sup>1</sup> On the record counsel for Cohen, while unaware whether Cohen's name was on A&C's UBS account as alleged, nonetheless agreed to remove Cohen's name from the account (*Tr.*

## Discussion

In opposition and in support of his cross motion to dismiss, Cohen argues that this proceeding is procedural improper as A&C is not a judgment creditor of Cohen. Cohen argues that bringing this proceeding is merely an attempt to avoid the preclusive effect of *res judicata* and collateral estoppel where the issues raised by A&C have already been extensively litigated and decided by both this Court and the Appellate Division. Cohen also argues that A&C is looking for yet *another* judicial accounting.

CPLR 5225 is a device used by a judgment creditor to demand return of money or property from a judgment creditor. Subsections (a) and (b) are prefaced with language such as (emphasis added): “[u]pon motion of the *judgment creditor*” and “[u]pon a special proceeding commenced by the *judgment creditor*.” A “judgment creditor” is defined in CPLR section 105(1) as “a person in whose favor a money judgment is entered or a person who becomes entitled to enforce it”

A&C is not and has never been a judgment creditor of Cohen and therefore does not have standing to commence a judgment enforcement proceeding under CPLR 5225. A&C misuses this statute in what can be viewed as an attempt to again appeal the prior decisions by the court. After exhausting every appeal of this court’s rulings, A&C misuses the CPLR to attempt to get a further review of the judicial accounting.

Presumably, A&C has chosen this avenue because the issues raised regarding the Mednick fees are barred by *res judicata* and collateral estoppel. “Under the doctrine of *res judicata*, a disposition on the merits bars litigation between the same parties or those in privity

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with them on a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior action” (*Barbieri v Bridge Funding* 5 AD3d 414, 415 [2<sup>nd</sup> Dept 2004]). “Res Judicata is designed to provide finality in the resolution of disputes to assure that parties may not be vexed by further litigation” (*Matter of New York Relations Board v Holland Laundry Inc.* 294 NY 480, 493-494 [1945]). The issue of the Mednick fees were part of the accounting held by the Special Referee who reviewed all of A&C’s assets, including all of its cash, accounts, and accounts receivable. Contained within that were the Mednick fees (*See Cohen Aff, Ex J; Ex K*). A&C’s claims to the Mednick fees arise from the same facts, claims, and transactions at issue in the prior action. Since they have already been litigated and decided, they should also be dismissed pursuant to res judicata.

Therefore, the cross motion to dismiss is granted and the motion to enforce the judgment is denied.

Section 130-1.1 of the Rules of The Chief Administrator (22 NYCRR 130-1.1) states that the Court may award “costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part” Frivolous conduct is defined in subsections (c)(1) and (2) as conduct which is “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” or “is undertaken primarily . . . to harass or maliciously injure another”.

After what was already a protracted litigation, A&C has brought these repetitive claims four years after the judgment was entered in the prior action. The grounds for bringing this action seeking to enforce the judgment are devoid of merit. “Where motions are redundant to

matters already decided on the merits . . .sanctions are appropriate to punish frivolous litigation”  
(*Levy v Carol Mgt Corp* 260 AD2d 27,34 [1<sup>st</sup> Dept 1999]). Accordingly, Cohen’s request for costs and attorneys fees in defending this action is granted. Furthermore, A&C is barred from filing any further actions raising the same claims without prior leave of this Court (See *Sassower v Signorelli* 99 AD 358, 359-60 [2<sup>nd</sup> Dept 1984]).

**Conclusion**

Therefore, based on the foregoing, it is hereby

ORDERED that the motion to enforce the judgment is denied, and it is further

ORDERED that the cross motion seeking to dismiss this action is granted and the complaint is dismissed with costs and disbursements to respondent as taxed by the Clerk of the Court; and it is further


ORDERED that A&C can file no further proceedings related to the same facts, transactions, and issues to those in the prior action, the Fox action, or this immediate action without prior leave of this Court; and it is further

ORDERED that A&C reimburse Cohen for all costs and attorneys fees incurred in defending this action within 21 days of receipt of a bill of costs; and it is

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the Order and Decision of this Court.

Dated: June 9, 2014

ENTER:  
  
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JUSTICE RICHARD B. LOWE III  
J.S.C.