Arkin Kaplan Rice LLP v Kaplan
2016 NY Slip Op 30845(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 652316/2012
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 48

ARKIN KAPLAN RICE LLP, STANLEY S. ARKIN, and LISA SOLBAKKEN,

Plaintiffs,

-against-

HOWARD J. KAPLAN, MICHELLE A. RICE and KAPLAN RICE LLP,

Defendants,

AND

ARKIN KAPLAN RICE LLP, a dissolved firm,

Nominal Defendant.

Index No.: 652316/2012

Mtn Seq. Nos. 019, 020 & 021

DECISION AND ORDER

JEFFREY K. OING, J.:

Mtn seq. nos. 019, 020, and 021 are consolidated for disposition.

In mtn seq. no. 019, plaintiffs Arkin Kaplan Rice LLP ("AKR"), Stanley S. Arkin ("Arkin"), and Lisa C. Solbakken ("Solbakken") move, pursuant to CPLR 5015, for an order (1) modifying or vacating the order of Justice O. Peter Sherwood, dated December 3, 2012 (the "December 3rd Order"), to the extent that it requires the "return" of $513,147.16 to AKR, and (2) vacating the bond in that amount (the "Bond"), or, in the alternative, reducing the Bond to $201,245.69, and staying any efforts to call down on the Bond until after the pending final accounting.

In mtn seq. no. 020, defendants Howard J. Kaplan ("Kaplan") and Michelle A. Rice ("Rice") move, pursuant to 22 NYCRR § 130-1.1, for an order: (1) awarding sanctions against Arkin and Solbakken and their counsel in an amount to include defendants' reasonable expenses and attorneys' fees incurred in opposing plaintiffs' motion; and (2) imposing a financial sanction of statutory interest on the $513,147.16 ordered to be repaid to AKR from December 3, 2012 to the date that it is repaid.

In mtn seq. no. 021, Kaplan and Rice move, pursuant to Partnership Law § 43, directing Arkin to pay $884,351.47, plus interest, into AKR's bank account.

Mtn Seq. No. 019

The underlying facts and allegations have been discussed in several prior decisions in this action, at the trial court and appellate levels. As described by the Appellate Division, First Department, in a decision reported at 120 AD3d 422 (1st Dept 2014) (hereinafter referred to as the "Sublease Appellate Decision"), on August 25, 1999, the law firm Arkin, Schaffer & Kaplan LLP ("ASK"), which devolved from a law firm originally founded by Arkin, entered into a sublease with Ladenburg Thalmann & Co., Inc. ("Ladenburg") for office space at 590 Madison Avenue (the "Sublease"). ASK, Arkin, Kaplan and others executed the Sublease, as subtenants (Id. at 423).

In August 2002, Arkin Kaplan LLP ("Arkin Kaplan") (successor in interest to ASK), Arkin, Kaplan, Rice, nonparty Anthony B. Coles, and Ladenburg executed an amendment to the Sublease, which expanded the Sublease space. In the amendment, Ladenburg acknowledged that two individuals had withdrawn as partners of Arkin Kaplan, and were, therefore, "released from any and all obligations under the Sublease," and that Coles and Rice were admitted as partners (120 AD3d at 423-424).

In October 2004, Arkin Kaplan, Arkin, Kaplan, Rice, nonparty Sean O'Brien and Ladenburg executed a second amendment to the Sublease, expanding the Subleased space, and granting Arkin Kaplan the option to extend the Sublease's June 30, 2010 expiration date to June 29, 2015. In July 2006, Rice was elevated to a named partner, and Arkin Kaplan changed its name to Arkin Kaplan Rice LLP ("AKR"). By letter dated November 16, 2009, AKR informed Ladenburg that it wished to extend the Sublease for an additional five years, to June 29, 2015 (Id. at 424).

As of May 17, 2012, AKR became a partnership-in-dissolution, and the AKR partners-in-dissolution were Arkin, Solbakken, Kaplan, and Rice. On that same day, Kaplan and Rice announced the formation of their new law firm, defendant Kaplan Rice LLP ("Kaplan Rice"). AKR changed its name to Arkin Solbakken LLP

("Arkin Solbakken"). On June 26, 2012, Kaplan and Rice informed Ladenburg that they had withdrawn from their obligations as signatories on the Sublease. Ladenburg rejected Kaplan's and Rice's withdrawal, and stated that it intended to hold them liable under the Sublease despite AKR's dissolution (Id.).

On July 10, 2012, Arkin Solbakken sought to change its name back to Arkin Kaplan Rice LLP, and registered the firm as a limited liability partnership. Arkin, on behalf of AKR, served on Kaplan and Rice notices to vacate. AKR, Arkin, and Solbakken then commenced this action alleging that AKR's partners-in-dissolution continued to operate two separate law partnerships out of the premises, and that defendants remained in the space from May 18, 2012 to August 31, 2012, but refused to compensate AKR for their use of the space and services. The complaint further alleges that defendants converted assets belonging to AKR, and engaged in other actions that interfered with the orderly winding up of AKR's affairs (Id. at 424-425).

Relevant to this motion is the December 3rd Order in which Justice Sherwood issued the following order:

> Plaintiffs are directed to return the amount of $513,147.16 to the AKR account held at Signature Bank forthwith. Said sum was withdrawn to pay the 'hole in the rent' resulting from the departure of defendants from the premises formerly used by AKR and for future rent escalation costs, all in violation of prior orders of this court restricting use of AKR funds for payment of

> pre-May 17, 2012 expenses unless expressly authorized by the court or pursuant to agreement of the parties.
>
> There shall be two (2) signatures required on all future disbursements from the AKR account, one from each side. The parties shall execute new signature authorization cards as may be required by the banking institution.
>
> The parties shall proceed without delay to complete all pre-motion disclosure relating to the obligations of the parties under the AKR lease.

Relying on CPLR 5015 ("Relief from judgment or order"), plaintiffs argue that this Court should modify or vacate the December 3rd Order and the Bond because, they allege, in the Sublease Appellate Decision, the First Department "reversed, modified, or vacated" the prior orders on which the December 3rd Order was purportedly based. Moreover, they characterize the December 3rd Order as a "'non-final disposition." Plaintiffs support their assertion with the statement by the Appellate Division, First Department, in the Sublease Appellate Decision (120 AD3d 422), that "'AKR is liable for any obligations under the sublease until the expiration of the extended period'" and that AS LLP is not AKR's successor in connection with this liability" (Plaintiffs' Memorandum in Support at 7, citing 120 AD3d at 427).

The assertion that the Appellate Division "reversed, modified, or vacated" the December 3rd Order is unpersuasive. Rather, in a second decision issued by the Appellate Division in

this action, also issued on August 21, 2014 (hereinafter referred to as the "Repayment Appellate Decision"), the First Department unanimously affirmed the December 3rd Order "to the extent of directing plaintiffs to return money to plaintiff Arkin Kaplan Rice LLP's (AKR) account at Signature Bank forthwith, and requiring two signatures on all future disbursements from the account" (120 AD3d at 427-428). In so doing, the Appellate Court stated that:

> Plaintiffs' use of funds in the AKR account to pay post-dissolution rent expenses was in violation of a preliminary injunction and subsequent orders limiting plaintiffs' use of those funds to the payment of pre-dissolution expenses. Contrary to plaintiffs' apparent contention, defendants were not required to demonstrate anew their entitlement to the preliminary injunction in support of their motion to enforce the injunction.

(Id. at 428).

Defendants' reliance upon the express statement of affirmance in the Repayment Appellate Decision predominates over plaintiffs' interpretation of the Sublease Appellate Decision that the December 3rd Order was "reversed, modified, or vacated." "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court" (J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey, 45 AD3d 809, 809 [2d Dept 2007]; accord NAMA Holdings, LLC v Greenberg Traurig, LLP, 92 AD3d 614,

614 [1st Dept 2012]). The Repayment Appellate Decision considered the appeal of the December 3rd Order, whereas the Sublease Appellate Decision merely addressed the appeal of an order dated June 3, 2013.

Moreover, in the Repayment Appellate Decision affirming the December 3rd Order, the First Department stated that "the order on appeal is not superseded by the motion court's June 3, 2013 order, since the two orders do not address the same issues" (120 AD3d at 428). The "order on appeal" that it referred to is the order "which granted defendants' motion to enforce prior court orders to the extent of directing plaintiffs to return money to plaintiff Arkin Kaplan Rice LLP's (AKR) account at Signature Bank forthwith, and requiring two signatures on all future disbursements from the account" (Id. at 427-428).

Plaintiffs, nonetheless, argue that this Court should modify or vacate the December 3rd Order pursuant to its "inherent power to set aside, correct or modify its own orders" in the interest of justice. In this regard, they argue that because Ladenburg and three other pre-dissolution creditors were properly paid with AKR funds AKR should not be required to seek a means to compel these creditors to return those payments. They assert further that neither Arkin nor Solbakken can return monies that they did not receive, and therefore, they are not properly the subject of

the remedial nature of the December 3rd Order. They aver that AKR owes Arkin funds for repayment of his capital account, as well as loans that Arkin made to AKR for payment of rent that AKR owed under the Sublease, and that these amounts should be offset against any amounts owed by plaintiffs personally.

This argument is unconvincing. Plaintiffs themselves note that these issues will be resolved in the context of the accounting, and the order of an accounting constitutes law of the case (see Shandell v Katz, 159 AD2d 389, 390 [1st Dept 1990] [because the Court has already directed that these issues be determined by a referee in an accounting, the trial court properly denied the plaintiff's motion under the doctrine of law of the case]). Furthermore, this Court cannot sort out the controverting assertions on these papers, and the December 3rd Order should stand, and the effect of it revisited after completion of the accounting. Although "law of the case is inapplicable where new evidence emerges later in the proceeding" (Feinberg v Boros, 99 AD3d 219, 237 [1st Dept 2012] [Moskowitz, J., concurring opinion], lv denied 21 NY3d 851 [2013]), no new evidence has been shown to warrant the relief requested.

The same is true for the alternate request to reduce the amount of the Bond. Plaintiffs aver that this Court should reduce the Bond to $201,245.69, and stay any efforts to call down

on it pending a final accounting, contending that the December 3rd Order erroneously directed the return of $513,147.16, which this Court apparently believed was paid to Ladenburg for AKR's post-dissolution rent obligations. Plaintiffs assert that payment to Ladenburg totaled only $489,299.20, not $513,147.16. Allegedly, within days of the December 3rd Order, AKR was reimbursed $288,482.60 of the amount paid to Ladenburg, who claims entitlement to the remaining $200,816.60. Plaintiffs contend that the December 3rd Order erroneously includes payments AKR made to pre-dissolution creditors, including: (1) $5,243.50 to Stroock & Stroock & Lavan LLP; (2) $18,175.37 to O'Brien LLP; and (3) $429.09 to Dial Car Inc. Plaintiffs state that only $201,245.69 remains at issue, and all other amounts were already reimbursed to AKR or are not subject to Justice Sherwood's December 3rd Order, both of which were never in dispute.

Defendants argue in opposition that the inclusion of the payments to pre-dissolution creditors was not in error. They contend that when Justice Sherwood issued his ruling he was aware that some of the money had been used to pay for things other than rent, but he still required obligations to pre-dissolution creditors be authorized by both parties and ordered that the money be returned. Defendants contend that Arkin and Solbakken remain liable for the full amount in the December 3rd Order,

namely $513,147.16. As stated above, these issues will be resolved in the accounting.

Accordingly, plaintiffs' motion is denied.

Mtn Seq. No. 020

Defendants seek an award of sanctions against Arkin and Solbakken and their counsel for an amount to include defendants' reasonable expenses and attorneys' fees incurred in opposing plaintiffs' motion, and imposing a financial sanction of statutory interest on the $513,147.16 ordered to be repaid to AKR from December 3, 2012 to the date that it is repaid.

Defendants argue that Arkin and Solbakken have repeatedly sought to avoid their repayment obligations of monies that they misappropriated from Kaplan, Rice, and AKR. They allege that plaintiffs misrepresented material facts and relied on arguments that Supreme Court and the First Department rejected numerous times. They assert that the Court prevented plaintiffs from using funds from the AKR account to pay post-dissolution expenses by issuing a preliminary injunction and the December 3rd Order of repayment, yet plaintiffs filed the instant motion asserting substantially the same arguments under an inapplicable CPLR provision. Defendants argue that plaintiffs' re-litigation of the same issues constitutes "frivolous conduct."

As for misrepresentations, defendants cite two. First, they contend that, in support of mtn seq. no. 019, Arkin falsely stated that "Justice Sherwood made no ruling at [the November 30, 2012] conference" (citing Arkin Aff., sworn to June 16, 2015, ¶ 8). According to defendants, at the hearing, Justice Sherwood ordered Arkin to return the funds, memorialized the ruling in a written order, and did not, as plaintiffs claim, suggest that the parties "work something out that makes sense to both sides" and, "if they could not do so, return to the Court to further address the issue."

As for an alleged second misrepresentation to the Court, defendants assert that in mtn seq. no. 019, wherein the plaintiffs argued that the December 3rd Order was superseded by the First Department's modification of the Sublease order, and must therefore be vacated, they failed to inform this Court that the First Department stated that the December 3rd Order is not superseded by the motion court's June 3, 2013 Order because the two orders do not address the same issues.

"22 NYCRR § 130-1.1 permits this court to impose sanctions, costs and attorneys' fees on a party who engages in frivolous conduct, such as advancing arguments completely lacking in legal merit, or misusing legal procedures to delay resolution of the litigation and harass the other party" (Good Old Days Tavern v

Zwirn, 261 AD2d 288, 289 [1st Dept 1999]). A motion is not frivolous if its supported by a "somewhat colorable argument" (see Kremen v Benedict P. Morelli & Assoc., P.C., 80 AD3d 521, 523 [1st Dept 2011]). Such is the case here. The two decisions (Sublease Appellate Decision and Repayment Appellate Decision) issued on the same day (August 21, 2014) afforded at least a colorable basis for the assertions made by plaintiffs in mtn seq. no. 019.

As for the alleged misrepresentation that "Justice Sherwood made no ruling at [the November 30, 2012] conference" (Arkin Aff., ¶ 8), in the very next paragraph, Arkin states: "A few days later, Justice Sherwood issued the December 3rd Order, which is a 'non-final disposition' that directs the return of $513,147.16 to AKR's account on the grounds that '***[s]aid sum was withdrawn to pay the 'hole in the rent'*** purportedly in violation of 'prior orders ... restricting use of AKR funds for payment of pre-May 17, 2012 expenses unless expressly authorized by the court or pursuant to agreement of the parties,'" and he referenced a copy of the December 3rd Order, which he attached as an exhibit to his affidavit (Arkin Aff., ¶ 9).

Under these circumstances, defendants failed to demonstrate plaintiffs engaged in frivolous conduct. As such, their motion for an award of sanctions against Arkin and Solbakken and their

counsel for an amount to include defendants' reasonable expenses and attorneys' fees incurred in opposing plaintiffs' motion, and imposing a financial sanction of statutory interest on the $513,147.16 ordered to be repaid to AKR from December 3, 2012 to the date that it is repaid is denied.

Mtn Seq. No. 021

Defendants seek an order directing Arkin to pay $884,351.47, plus interest, into AKR's bank account. In that regard, defendants allege the following: when defendants learned that plaintiffs were using AKR funds to pay AS LLP's expenses, they notified Signature Bank, which then placed an account restriction, requiring signatures from four of the former partners of AKR for each disbursement. Although Justice Sherwood permitted AKR to pay the June and July 2012 rent, he decided that each firm occupying the space was liable to pay its proportionate share, and that AKR funds could not be used to pay any post-May 17, 2012 expenses thereby preserving the funds pending the final accounting. Thereafter, defendants allege that Signature Bank surreptitiously removed funds from AKR's bank account, purportedly to renew the letter of credit ("LOC") securing AKR's Sublease obligations in lieu of a security deposit although AKR was in dissolution. Allegedly, Signature Bank agreed with Arkin, a long-time and significant Signature Bank depositor and counsel

for the bank, to alter the bank restrictions that it had imposed. On November 28, 2012, without notice to Kaplan, Rice, or Justice Sherwood, Arkin unilaterally transferred $513,147.16 out of AKR's account in violation of the July 30, 2012 order, $489,299.20 of which was paid to Ladenburg for AS LLP's November and December 2012 rent obligation. On November 30, 2012, Justice Sherwood ordered Arkin to restore the funds to the account, and reinstated the signature requirements.

Defendants allege further that in a March 2013 email Signature Bank notified Kaplan and Rice that Ladenburg might make a demand under the LOC, whereupon Kaplan informed the bank that: (1) AKR funds are in dispute and frozen by court order; (2) Arkin's unauthorized renewal of the LOC violates partnership law; and (3) the funds cannot be used to pay post-dissolution rent. In April 2013, Arkin, AS LLP, and the subtenants underpaid the monthly rent obligation by approximately $40,000. According to defendants, Arkin, with Ladenburg's agreement, orchestrated the partial defaults so that Kaplan's and Rice's share of the AKR account would be used to pay post-dissolution rent. Rather than pursue the current occupants of the space, Ladenburg instead chose to draw down on the improperly renewed LOC to pay for a portion of those defaults. Eventually, Ladenburg sued Signature Bank for its failure to honor the LOC, resulting in a January 30,

2014 judgment against the bank for $406,058.80 to be paid to Ladenburg via the LOC.

Defendants claim that Signature Bank, apparently at Arkin's behest, surreptitiously purported to renew the LOC for 2013 and 2014. On March 26, 2015, Signature Bank transferred to Ladenburg $884,351.47, purportedly to pay AKR's post-dissolution rent obligations under the LOC. This amount was $478,292.67 more than what Ladenburg was entitled to under the judgment, and it exceeded the LOC's face amount by more than $50,000. Allegedly, Signature Bank made these transfers in violation of the LOC's express terms. Signature Bank did this transaction knowing that the funds were disputed, there was a four-signature requirement, Kaplan and Rice had objected to the improper renewal of the LOC, and there were multiple court orders protecting Kaplan and Rice's interests in the AKR account from being used to pay post-dissolution rent.

Based on these allegations, defendants seek an order directing Arkin to pay the approximately $900,000 that was transferred to Ladenburg to pay his post-dissolution rent. Defendants argue that, as a former partner of AKR, Arkin has a fiduciary duty to AKR and defendants to preserve the assets until completion of the winding up of AKR, and not deplete the AKR account to pay post-dissolution rent. They request that this

Court require him to return the funds to the AKR account so that they can be included in the accounting of AKR's assets. They argue Arkin breached his fiduciary duties when he schemed to have Signature Bank renew an improper LOC, on which Ladenburg drew using defendants' partnership interests to pay Arkin's personal liability under the Sublease. Defendants also argue that they should not be made to pay out of their personal assets for Arkin's failure to fulfill the obligations when he agreed to act as guarantor, and he (and his firm AS LLP) is the party that caused the defaults under the Sublease.

In opposition, plaintiffs present their version of what transpired as follows: According to plaintiffs, the Sublease is subject to an acceleration clause, and the LOC entitles Ladenburg to draw down on this security instrument upon AKR's default. The LOC renews automatically "at the option of the issuer" until the "Final Expiration Date" based on an "evergreen" provision in an agreement entered into between AKR and Signature Bank prior to the commencement of this lawsuit. They aver that the First Department has confirmed that AKR is obligated to pay rent under the Sublease, and that AS LLP is not AKR's successor in connection with that obligation. Plaintiffs state that after AKR's dissolution, to mitigate AKR's debt obligations under the Sublease, AKR located various sub-subtenants to occupy a portion

of the space. Payments made by AKR's sub-subtenants cover only a portion of what AKR owes under the Sublease. Allegedly, defendants used their newfound leverage over AKR's accounts to block AKR from paying the "hole" in the rent, which resulted in AKR's default under the Sublease.

Plaintiffs state that in March 2013 Signature Bank informed defendants that it would honor the LOC if Ladenburg's demand strictly complied with it. In response, defendants requested that Supreme Court restrain the bank from honoring the LOC. On April 1, 2013, Justice Sherwood rejected defendants' request, concluding that AKR's bank "likely had rights" to access AKR funds pursuant to its agreements with the dissolved firm, and that he would not prevent the bank from acting pursuant to these rights.

Plaintiffs state further that in one of its two August 21, 2014 decisions (the Sublease Appellate Decision), the First Department held that "AKR is liable for any obligations under the sublease until the expiration of the extended period" (120 AD3d at 427). Although it concluded that defendants were released from personal liability on the Sublease upon their withdrawal from AKR, the Appellate Court did not suggest that this conclusion relieved AKR of its rental obligations. Plaintiffs aver that on January 23, 2015, this Court acknowledged this

liability, and the parties agreed that defendants' partnership interests in AKR are limited to AKR's profits and surplus.

Plaintiffs also note that in the action brought by Ladenburg against Signature Bank to enforce the LOC (128 AD3d 36 [1st Dept 2015]), the First Department ordered Signature Bank to honor Ladenburg's demand on the LOC, and acknowledged that AKR's LOC was proper security for Ladenburg to ensure payment by AKR for Sublease rent; upon AKR's default, the bank was required to honor Ladenburg's demand to draw down on the LOC. The bank complied, resulting in a payment to Ladenburg of a total of $884,351.47. Plaintiffs contend that it was this judicial directive that resulted in the transfer of funds at issue to Ladenburg.

On June 1, 2015, defendants moved to transfer the remaining funds in AKR's account to an escrow account at their firm or the court, suggesting that the LOC was improperly paid. This Court disagreed, and recognized that the $884,351.47 paid to Ladenburg was taken by the AKR's bank to pay for the draw down on the LOC, and that Ladenburg had the right to that money.

Plaintiffs assert that Arkin cannot "repay" funds that were properly paid to AKR's creditor. At a prior hearing, Justice Sherwood made clear that "any rulings [were] not final because there are a lot of facts that ... are in dispute" such as AKR's ultimate liability under the Sublease.

This Court concurs with plaintiffs that the First Department's determinations in the Sublease Appellate Decision mandates that this motion be denied. Defendants cite Sexter v Kimmelman, Sexter, Warmflash & Leitner (43 AD3d 790, 794-95 [1st Dept 2007]) and others for the proposition that, "[a]s a former partner of AKR, Arkin has a fiduciary duty to AKR, Kaplan and Rice to preserve the assets until the winding up of AKR is complete." The Appellate Division has held, however, that: (1) it disagreed with the finding that because AKR never signed the sublease, its liability ended as of the date of dissolution; (2) although the Sublease (last amended in 2004) was never amended to replace Arkin Kaplan with AKR as a signatory to the Sublease, from 2006 until its dissolution in 2012, AKR's payment of rent while in possession of the premises created a presumption of an assignment of the Sublease; (3) there were sufficient facts in the record to support a finding that AKR assumed Arkin Kaplan's obligations under the Sublease; (4) AKR exercised the option to extend the Sublease for a five-year period, and represented itself to be the subtenant under the Sublease, both to Ladenburg and in various sub-sublease agreements with third parties; and (5) AKR is liable for any obligations under the Sublease until the expiration of the extended period (120 AD3d at 426-427).

As such, defendants have not shown for purposes of this motion that Arkin's conduct constitutes a breach of any fiduciary duty that he may have owed to the partnership. Accordingly, defendants' motion is denied.

Accordingly it is

ORDERED that motion (019) by Arkin Kaplan Rice LLP, Stanley S. Arkin, and Lisa C. Solbakken is denied; and it is further

ORDERED that the motion (020) by Howard J. Kaplan and Michelle A. Rice is denied; and it is further

ORDERED that the motion (021) by Howard J. Kaplan and Michelle A. Rice is denied; and it is further

ORDERED that consideration and determination of the parties' respective objections (NYSCEF Doc. Nos. 1339-1443) to the final accounting (NYSCEF Doc. No. 1379) is respectfully referred to a Special Referee or Judicial Hearing Officer to hear and report or, if the parties so-agree, to hear and determine, the merits of the objections and whether the final accounting should be confirmed, modified or rejected; and it is further

ORDERED that plaintiffs are directed, within fourteen days from the date hereof, to serve a copy of this order with notice of entry, together with a completed Information Sheet upon the Special Referee Clerk in the General Clerk's Office (Room 119M),

who is respectfully directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/26/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.