SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651834/2010
KADOSH, MICHEL
vs.
KADOSH, DAVID
SEQUENCE NUMBER : 017
RECEIVER SETTLE ACCOUNT

INDEX NO. _____
MOTION DATE 4/18/18
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 482-487, 491-492
Answering Affidavits — Exhibits _____ | No(s). 493-504, 512-514
Replying Affidavits _____ | No(s). 505-508

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 5/24/18

SHIRLEY WERNER KORNREICH J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

☒ 2 Cross-Motions Granted in Part

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MICHEL KADOSH, on behalf of himself and as a Member and in the right of 213 West 85th Street LLC,

Plaintiff,

-against-

DAVID KADOSH, 114 WEST 71ST STREET, LLC, 30 LEXINGTON AVENUE, LLC, and 3D IMAGING CENTER CORP.,

Defendants.

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Index No.: 651834/2010

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

This lengthy and acrimonious dispute between brothers, Michel Kadosh (Michel) and David Kadosh (David), settled in the middle of trial on July 21, 2016. *See* Dkt. 522 (7/21/16 Tr.).[1] The parties agreed to have this court decide the remaining issue (how to split money held in escrow) in an order that the parties agreed would not be appealable. In accordance with the settlement, the court issued an order on August 5, 2016, which was filed on NYSCEF. *See* Dkt. 460 (the August 2016 Order).[2] It directed the temporary receiver, Robert Lewis (the Receiver),[3] who was holding the proceeds from the sale of 213 West 85th Street in escrow, to release, *subject to certain conditions*, $2.7 million to Michel and $2.7 million to David; approximately $1.6 million was to be held pending further order of the court. *See id.* The court later directed

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] The parties were allocuted for a second time on August 5, 2016 because of a misunderstanding regarding the amount in escrow. *See* Dkt. 524 (8/5/16 Tr.).

[3] The Receiver was appointed by order dated August 7, 2012. *See* Dkt. 497. Aside from the issue addressed herein, the Receiver's performance was exemplary.

the Receiver to remit the remaining funds to Michel by order entered on November 2, 2017. *See* Dkt. 467 (the November 2017 Order).[4]

The issue currently before the court concerns the Receiver's violation of the August 2016 Order's preconditions to release of funds. Specifically, the release of $2.7 million to each Kadosh brother was to occur "upon receipt of a letter from each party (David Kadosh's letter to be signed both **by his counsel, Frank L. Perrone, Jr.,** and David), with instructions as to how and where the money is to be paid." *See* Dkt. 460 (emphasis added). The reason for the precondition was David's indebtedness to Davidoff Hutcher & Citron LLP (DHC) for legal fees incurred in this heavily litigated action.[5] In fact, in a letter from David to DHC, dated May 29, 2015, David acknowledges owing $387,815.05 in legal fees. *See* Dkt. 501 (the May 2015 Letter).[6] In the May 2015 Letter, David "irrevocably" consented "to [the Receiver] paying DHC directly from the Escrow any fees due to the Firm for work rendered in connection with the Actions and/or for any other fees I then owe to the Firm" and that DHC "**will simply give written notice [to the Receiver] and me of the amounts then owed and [the Receiver] shall immediately, without any further notice required, make payment directly to the Firm from my share of the Escrow.**" *See id* (emphasis added). Hence, the August 2016 Order ensured that DHC was paid from the escrowed funds.

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[4] It should be noted that despite waiving his right to appeal in an on-the-record, robust allocution of both David ***and his wife*** [*see* Dkt. 522 (7/21/16 Tr. at 10-18)], David, through new counsel (Douglas J. Martino of Martino & Weiss), filed a notice of appeal of the November 2017 Order. *See* Dkt. 511. The implications of that frivolous filing are not currently before the court.

[5] As indicated at oral argument, DHC's representation, particularly the work of Frank Perrone at trial, was excellent. But for the quality of DHC's representation, which led to the settlement, the court can say with complete confidence that David would have recovered far less than he did.

[6] The amount David owes to DHC has since substantially increased due DHC's trial work.

It is undisputed that the Receiver violated the August 2016 Order. He admits that, by check dated October 30, 2016, he paid $2.7 million to David without first notifying DHC or procuring its consent.[7] *See* Dkt. 491 at 2-3 (admitting distributing $2.7 million to David even though he "did not receive written letters as directed by the [August 2016 Order]."). He justifies his actions by claiming he "was not aware of the [August 2016 Order]" and "relied on **David's** oral representations."[8] *See* Dkt. 506 at 3-4 (emphasis added); *see also id.* at 4 ("To the best of my recollection I had not received nor reviewed a copy of the [August 2016 Order] prior to the time that I distributed those fees.").[9] He takes this position despite executing an e-filing

[7] There is some confusion in the papers about whether the payment was made on October 30 or November 3, 2016. While this issue is not material, the court notes that the check is dated October 30, but posted on November 3. *See* Dkt. 492 at 4.

[8] In neither of his affidavits does the Receiver state exactly what David told him.

[9] The court is skeptical of this assertion because, the very afternoon the August 2016 Order was entered on NYSCEF (at 4:14 pm), the Receiver emailed Michael Zapson, an attorney at DHC, asking him "Where do I send the checks?". *See* Dkt. 503. The Receiver's original moving affidavit indicates he was immediately told about the August 2016 Order, though his "amended" affidavit omits this admission and instead refers to a later (undated) conversation with David. *Compare* Dkt. 483 at 3 (claiming to have relied on "the oral representations of respective counsel who telephoned me from the courthouse"), with Dkt. 491 at 2 (claiming to have relied on David's oral representations). The Receiver does not state the specifics of either of those representations (presumably, the call from counsel would have mentioned a court order). Nor does he explain why he simply did not look up the August 2016 Order on NYSCEF. Indeed, that order was e-filed on August 5, 2016 at 2:57 pm [*see* Dkt. 460], approximately an hour prior to his email to Zapson (but for his knowledge of the August 2016 Order, what impelled him to send this email?). Two days later, on August 7, 2016, Zapson responded: "Hold on to it as I have to work out **a fee issue** with the client [i.e., David]." *See* Dkt. 503 (emphasis added). Hence, Zapson had specifically instructed the Receiver not to disburse the funds until the fee issue with David had been resolved. Moreover, in February 2017, at a "coincidental" meeting at a boat show in Florida, Zapson claims he advised the Receiver that DHC "had not yet reached a resolution with David." *See* Dkt. 495 at 4; *but see* Dkt. 506 at 4 (disputing what was said at boat show meeting). Regardless, even if the court believes that the Receiver never saw the August 2016 Order, that fact, as discussed herein, does not benefit him. Simply put, either the Receiver knowingly violated a court order and ignored a direction of counsel, or he acted recklessly by

authorization in conjunction with his appointment as Receiver, in which he, like all counsel of record in this part, agreed to accept service of orders filed on NYSCEF. *See* Dkt. 83. As reflected on NYSCEF, it was the Receiver himself who e-filed this authorization. In fact, the docket in this action indicates that the Receiver personally e-filed nearly 40 documents. Apparently, at some point, the Receiver stopped following the docket despite not yet having been relieved.

DHC (claiming to be owed in excess of $1.25 million), naturally, is unhappy. Instead of receiving payment for its work from the $2.7 million prior to such funds being disbursed to David,[10] it is now embroiled in litigation with David (in which, quite remarkably, DHC is being sued for malpractice). *See Davidoff Hutcher & Citron LLP v Kadosh*, Index No. 657292/2017 (Sup Ct, NY County) (Ling-Cohan, J.). It is against this backdrop that the current flurry of cross-motions come before the court.[11]

First, on November 16, 2017, through counsel, the Receiver moved to settle his accounts, for discharge as Receiver and of his surety, and to cancel his undertaking. *See* Dkt. 482. On December 18, 2017, DHC filed opposition and cross-moved for an order declaring that the Receiver "failed to faithfully discharge his duties in this action" by releasing the $2.7 million to David in violation of the August 2016 Order. *See* Dkt. 493. On December 27, 2017, the

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releasing the funds without confirming the existence or parameters of the court's order. The Receiver is culpable is either event.

[10] Under the May 2015 Letter, DHC was entitled to obtain all of this money from the Receiver. This explains David's incentive to get the money first, thereby violating the May 2015 Letter and the August 2016 Order.

[11] Prior to these cross-motions, by order dated November 6, 2017, the court granted DHC's motion to be relieved as David's counsel. At that point, a conflict existed between the parties. However, the trial was over, David had given up his right to appeal, and no monies remained in escrow. The representation was over. *See* Dkt. 479.

Receiver responded with another cross-motion, seeking *nunc pro tunc* appointment of Moshe Z. Mirsky, Esq. as his counsel.[12] *See* Dkt. 505. DHC filed a response on February 15, 2018. The court reserved on the cross-motions after oral argument. *See* Dkt. 516 (3/7/18 Tr.).

The parties dispute the implications of the Receiver's violation of the August 2016 Order. The Receiver takes the position that there are no such implications because, *inter alia*, (1) DHC lacks standing to complain about his violation; (2) DHC has not been damaged because it can recover from David in their pending litigation; and (3) he has immunity. His first two arguments are baseless. The preconditions in the August 2016 Order were specifically for the benefit of DHC, as DHC was the only party that stood to lose if David got paid from the escrow without first paying his legal bills. And while the amount of DHC's damages might be mitigated based on the outcome of its litigation with David, such litigation is only necessary due to the Receiver's violation. Ergo, the time and money DHC now must spend seeking to recover from David is the direct consequence of the Receiver's violation. The Receiver, of course, could seek to offset his liability with any recovery DHC may obtain from David.

The Receiver's possible immunity, therefore, is the dispositive issue. Ordinarily, "[a] receiver, as an officer of the court, can have no liability for actions performed 'within the scope of his authority pursuant to the receivership order.'" *Kaufman Properties & Assocs., LLC v 2 Court St., LLC*, 51 AD3d 1206 (3d Dept 2008), quoting *Bankers Fed. Sav. FSB v Off W. Broadway Developers*, 227 AD2d 306 (1st Dept 1996), citing *Copeland v Salomon*, 56 NY2d 222, 231 (1982); *see Maltz Auctions, Inc. v Tannenbaum*, 98 AD3d 722 (2d Dept 2012) (same). However, "immunity only extends to a receiver who acts in good faith **and with appropriate**

[12] Mr. Mirsky is admonished for filing this cross-motion, as the court had already denied his request to be appointed as counsel. *See* Dkt. 502 (11/6/17 Tr. at 18-19). He did not move for reargument or file a notice of appeal. This cross-motion, therefore, is summarily denied.

care and prudence." *In re Liquidation of U.S. Capital Ins. Co.*, 36 Misc3d 635, 637-38 (Sup Ct, NY County 2012) (emphasis added), citing *Benedictine Hosp. v Glessing*, 90 AD3d 1383, 1386 (3d Dept 2011). Thus, a receiver may be held personally liable only where he "acted in bad faith **or with a lack of due care**." *Ocean Side Institutional Indus., Inc. v United Presbyterian Residence*, 254 AD2d 337, 338 (2d Dept 1998) (emphasis added). That is because a receiver is considered a fiduciary, who is exculpated for acts taken in good faith, but "may be held wanting in the performance of his duty and liable" if he breached his duty of care. *Meltzer v Grazi*, 10 AD2d 869 (2d Dept 1960); *see Jacynicz v 73 Seaman Assocs.*, 270 AD2d 83, 86 (1st Dept 2000); *Trustco Bank, N.A. v 400 Delaware Ave. Prop. Co.*, 256 AD2d 762, 763 (3d Dept 1998). That said, liability cannot be predicated on "*de minimis*" violations of court orders. *David Realty & Funding, LLC v Second Ave. Realty Co.*, 14 AD3d 450, 451-52 (1st Dept 2005). Moreover, a receiver cannot be sued without permission from the court, though such permission may be granted *nunc pro tunc*. *Guberman v Rudder*, 85 AD3d 683, 684 (1st Dept 2011); *Chang v Zapson*, 67 AD3d 435 (1st Dept 2009).[13]

The Receiver contends that he may not be held liable for what he characterizes as mere "errors in judgment." *See* Dkt. 508 at 9, citing *In re Fed. Union Sur. Co.*, 73 Misc 28, 31 (Sup Ct, NY County 1911), *aff'd*, 154 AD 936 (1st Dept 1913), *aff'd*, 211 NY 549 (1914). But that is not the accusation. Though the Receiver is not alleged to have acted in bad faith, he is alleged to have acted "with a lack of due care." *See Ocean Side*, 254 AD2d at 338. He is guilty of that offense. The only basis for the Receiver to have disbursed the $2.7 million to David is the

[13] DHC has clarified that it is not moving against the surety bond and "is not seeking leave of the Court to sue the [Receiver], only a declaration that the Receiver failed to properly discharge his duties." *See* Dkt. 514 at 6 ("Whether or not DCH will move against the Receiver or the surety bond is a determination that DHC will make at the appropriate time.").

August 2016 Order.[14] The Receiver, however, claims to have never seen that order. He apparently relied on David's oral representation to justify the disbursement, even though David was represented by counsel at the time.[15]

That was not a *de minimis* violation for which a receiver is ordinary exculpated. Leaving aside whether it was negligent for the Receiver to have failed to look up the August 2016 Order on NYSCEF (it was), it is inexcusable for him to have disbursed $2.7 million to David without first independently confirming that the court had permitted him to do so. A reasonable attorney could not (and should not) assume the existence or parameters of a court order merely by the say so of one of the litigants (especially in such a hotly contested case) without first reviewing a copy of the order or at least conferring with that litigant's counsel (who, as noted earlier, told the Receiver *not* to disburse the funds due to its fee dispute with David). According to the Receiver, he never saw a copy of the August 2016 Order prior to writing David a check for $2.7 million.

The Receiver's conduct amounts to gross negligence because his actions evinced a reckless indifference to the rights of the other parties in this action. *See Colnaghi, U.S.A., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823-24 (1993), citing *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554 (1992). The Receiver, a licensed New York attorney, cannot claim that an attorney acts reasonably by taking actions pursuant to a court order which he has never seen. The Receiver was specifically informed by DHC of a fee dispute with David, but sent David the money without first inquiring (e.g., with a quick email) of DHC the status of such dispute. While the Receiver may not have had reason to know that DHC had a lien on the funds

[14] It is undisputed that the Receiver had no authority to disburse funds to the parties without prior court approval.

[15] DHC does not, on the instant motion, ask the court to claw back the funds from David, who apparently sought to induce the Receiver to give him the money without DHC's knowledge.

in escrow, Zapson's August 7, 2016 email proves that the Receiver was aware of a fee dispute. More importantly, without actually reviewing the August 2016 Order, which could have contained any number of preconditions, the Receiver was in no position to ascertain who might be adversely affected by his actions. The court is unaware of any authority immunizing a receiver for this sort of reckless behavior. Immunity is supposed to protect fiduciaries from good faith exercises of judgment, but not the reckless release of millions of dollars to a dishonest litigant merely on his say so.

To be sure, while it was reckless for the Receiver to simply transfer the money to David without first confirming the existence and parameters of his authority to do so,[16] the real wrongdoer here is David, who apparently sought to evade the requirements of the August 2016 Order and the May 2015 Letter by fraudulently inducing the Receiver to transfer the money to him so DHC would lose its right to priority. While DHC's claims against David are currently before another Justice of this court, and though violation of the May 2015 Letter is not sanctionable because it is not a court order, David caused the August 2016 Order to be violated. A litigant who knowingly causes a court order to be violated may be held in contempt [*Tishman Constr. Corp. v United Hispanic Constr. Workers, Inc.*, 158 AD3d 436, 437 (1st Dept 2018), citing *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 (2015)] and may be held liable for all losses caused by his violation under Judiciary Law § 773. *See Gottlieb v Gottlieb*, 137 AD3d 614 (1st Dept 2016).

[16] Ordinarily, attorneys are not ethically permitted to communicate with a party that is represented by counsel. *See* 22 NYCRR § 1200.0 (Rules of Professional Conduct), Rule 4.2. Likewise, as an officer of the court, the Receiver also should not have communicated *ex parte* with David. *In re Ayres*, 30 NY3d 59, 63-64 (2017), citing 22 NYCRR § 100.3(B)(6).

While the Receiver bears significant fault under these circumstances, and, thus, is not immune, the proper recourse against him really turns on the outcome of DHC's claims against David. DHC can pursue its claim for fees against him in its pending action, and may also seek to hold him in contempt in this action. Until such issues are resolved, the court will not grant the Receiver's motion to settle his accounts or to be discharged. Such motion is denied without prejudice. The court will not further opine on the potential scope of the Receiver's liability since that issue is both premature and speculative. DHC should first seek to recover from David, and then, if necessary, settle up with the Receiver and his carrier. Accordingly, it is

ORDERED that the Receiver's motion to settle his accounts and to be discharged is denied without prejudice, the Receiver's cross-motion for the appointment of counsel is denied with prejudice; and it is further

ADJUDGED and DECLARED that the Receiver failed to faithfully discharge his duties in this action by releasing the $2.7 million to David in violation of the August 2016 Order; and it is further

ORDERED that the court retains jurisdiction over this action; and it is further

ORDERED that DHC shall promptly serve a copy of this order on David by email and overnight mail.

Dated: May 24, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.