

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

PRESENT: ~~Diamond~~ KAPNICK
Justice

PART ~~28~~ 39

~~ALAN~~ ALAN GORDON

- v -

SKYLINK AVIATION INC

INDEX NO. 11400/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

9/8/10
EC

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

NYS SUPREME COURT
RECEIVED
SEP 08 2010
MOTION SUPPORT OFFICE

SEP 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/7/10

[Signature]
BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
In the Matter of the Application of ALAN
D. GORDON,
Petitioner,

DECISION/JUDGMENT
Index No. 111401/09
Motion Seq. No. 001

For an Order, Pursuant to CPLR Article 75,
Disqualifying the law firm of Dechert LLP,
Andrew J. Levander, Esq. and Adam B. Rowland,
Esq., et al., as Attorneys for Respondents,

- against -

SKYLINK AVIATION, INC., WALTER ARBIB, SURJIT
BABRA and MAURICE SINGER,

Respondents.

-----X
BARBARA R. KAPNICK, J.:

This is a special proceeding brought pursuant to Article 75 of the CPLR seeking to disqualify the law firm of Dechert LLC ("Dechert"), Andrew J. Levander, Esq. ("Levander"), Adam B. Rowland, Esq. ("Rowland") and all other partners, associates and employees of Dechert from appearing as attorneys on behalf of, or otherwise representing, directly or indirectly, (i) any of the respondents or (ii) any other persons or entities hereafter appearing as a party, in connection with the arbitration entitled *Gordon v. SkyLink Aviation, Inc., et al.*, 50 517 T 00228 09, which petitioner instituted with the American Arbitration Association ("AAA"), in New York City, on or about May 5, 2009 (the "Arbitration"), and which was subsequently assigned by AAA to its International Center for Dispute Resolution.

001

By letter dated July 21, 2009, the AAA advised the attorney for petitioner and Dechert that the Arbitration would be held in abeyance, pending a court decision on the disqualification issue.

The Court (Diamond, J.) granted a Temporary Restraining Order ("TRO") on August 13, 2009 staying all proceedings in the Arbitration pending a further order of this Court.

The TRO was continued by this Court at the end of oral argument pending the decision on this motion.

Background

Petitioner is a party to a written shareholders agreement dated April 3, 2003 (the "SkyLink Wyoming Shareholders Agreement") in respect of a corporation known as SkyLink Aviation Wyoming, Inc. ("SkyLink Wyoming"). Each respondent to the Arbitration and to this petition is a party to the SkyLink Wyoming Shareholders Agreement.

Gordon contends in his Petition that as of April 3, 2003, (i) the sole asset and business of SkyLink Wyoming was its ownership of sixty (60%) of the stock of SkyLink Air and Logistics Support (USA), Inc., a District of Columbia corporation ("SkyLink USA"); and (ii) SkyLink USA was in the process of competing for the award of a prime contract from the United States Agency for International

Development to provide the United States Government with a contractor to improve airport management and operations in Iraq.

Petitioner claims that he contacted Levander, who was at that time a partner in the law firm of Swidler, Berlin, Shereff & Friedman ("Swidler") on April 9, 2003, for the purpose of seeking confidential legal advice and, ultimately, a legal opinion as to, *inter alia*, the corporate, tax and general governmental and related regulatory issues raised by the SkyLink Wyoming Shareholders Agreement.

Petitioner claims that Levander referred him to Rowland, who, at that time, was a colleague of Levander's and counsel to Swidler. Petitioner further claims that he specifically requested that the information and documents he disclosed to Levander and Rowland be kept confidential.

Petitioner asserts that he telefaxed to Rowland (at Rowland's request) on April 9, 2003 copies of the following confidential documents: (a) the SkyLink Wyoming Shareholders Agreement; (b) the written consent dated April 1, 2003, in respect of SkyLink Wyoming; (c) the by-laws of SkyLink Wyoming; (d) the written consent dated April 1, 2003, in respect of SkyLink USA; and (e) the by-laws of SkyLink USA.

He claims that he reasonably understood and believed that Levander and Rowland were acting as his attorneys and that his disclosure of this confidential information was made pursuant to an express understanding that such confidences would be accorded the protection and preservation of the client-lawyer relationship and, concomitantly, the client-lawyer privilege.

However, according to petitioner, Rowland subsequently advised petitioner by telephone call that Swidler, Levander and Rowland had concluded that the legal fee that Swidler wanted for the legal services would be too much for petitioner to pay and advised petitioner that Levander and Rowland would not go forward with their representation of petitioner.

On or before January 2005, both Levander and Rowland became affiliated with the Dechert firm.

Arbitration

Gordon, who was previously employed as an attorney for respondent Skylink Aviation, Inc. and other related Skylink entities, commenced the Arbitration, pursuant to a Demand for Arbitration dated April 7, 2009, against SkyLink Aviation, Inc., Walter Arbib, Surjit Babra, Maurice Abraham Singer, and SkyLink Aviation (Wyoming), Inc. claiming that the respondents breached his

rights under the SkyLink Wyoming Shareholders Agreement, and committed fraud and misrepresentation. The Statement of Claim, dated June 5, 2009, states, in relevant part that:

In breach and violation of the Shareholders Agreement for SkyLink Wyoming and in breach and violation of their fiduciary duties and in violation of the laws and by-laws applicable to SkyLink Wyoming and/or the Shareholders Agreement, SkyLink Canada [SkyLink Aviation, Inc.], Arbib and Babra, in collusion with Singer and/or others, have undertaken actions and activities to exclude claimant from the ownership of his Thirty (30%) Percent of the stock of SkyLink Wyoming, including all of the duly applicable voting and equity rights, and have disregarded claimant's rights as a shareholder, director and officer of SkyLink Wyoming and a director and officer of Skylink USA. As a result of these actions and activities, claimant has been denied appropriate participation in and knowledge of the financial or corporate affairs of SkyLink Wyoming and SkyLink USA. Claimant has never received any of the distributions to which he is and was entitled of any of the proceeds, dividends, profits, cash, fees or earnings of SkyLink Wyoming or SkyLink USA.

In their "Statement of Defense and Counterclaims," dated July 17, 2009, the respondents in the Arbitration asserted that:

1. Gordon's claims in this arbitration arise out of an unseemly course of conduct by a lawyer (Gordon) toward his own clients. While purporting to represent SkyLink, Gordon exploited his clients' trust and confidence so as to induce them to enter a "Shareholders Agreement" that provided him with substantial personal benefits at his clients' expense.... Gordon wrongly advised his clients that U.S. government contracting law required that they immediately restructure SkyLink Wyoming, a holding company for SkyLink USA, as a majority-owned U.S. enterprise. Despite his clear conflict of interest,

Gordon proposed that he, as a U.S. citizen, should receive 30% of SkyLink Wyoming's shares in return for a nominal payment of \$1,000, and that SkyLink Aviation could repurchase the shares for \$25,000 after two years. In addition, Gordon provided that he would receive a "director's fee" of \$10,000 per year and 5% of any cash distributions that SkyLink Wyoming received from SkyLink USA during his tenure as shareholder.

Respondents contend that there is no merit to Gordon's claims, and seek a declaration that SkyLink's tender of \$25,000 to Gordon for the repurchase of his shares was a valid exercise of SkyLink's option to repurchase the SkyLink Wyoming shares from Gordon, in accordance with the terms of the SkyLink Wyoming Shareholders Agreement. Respondents also assert a number of other arguments, defenses and counterclaims against Gordon.

Respondents appeared in the Arbitration by their counsel, the Dechert firm, which has long represented SkyLink.¹

Gordon contends that as the successor firm to Swidler, Dechert should be disqualified from representing respondents in the Arbitration because the subject matter of the Arbitration presents identical information, issues and documents to those previously

¹ Respondents use the term "SkyLink" to refer collectively to a number of inter-related companies, including SkyLink Aviation, Inc., SkyLink Air and Logistic Support (USA) Inc. and SkyLink Aviation (Wyoming) Inc., as well as the individual respondents in the Arbitration.

disclosed by Gordon in confidence to Levander and Rowland in April 2003.

Levander and Rowland maintain that neither they nor their law firms ever represented, or agreed to represent, Gordon personally. They assert that they represented the SkyLink entities over the course of many years, that Gordon was well aware of this from his prior work as an in-house attorney for the UN, and that he sought legal advice solely in his capacity as an employee of SkyLink, i.e., doing legal work for SkyLink. Levander and Rowland further submit that their relationship with Gordon had always been based exclusively on their role as counsel to the SkyLink entities. In addition, Levander and Rowland state that Gordon contacted them as Skyline's outside counsel, and that they understood petitioner's request to be coming from SkyLink, and not from Gordon in any personal or individual capacity.

Petitioner now moves by Order to Show Cause for an order of disqualification.

Discussion

"[A] party seeking to disqualify an attorney or a law firm on the ground of prior representation must establish '(1) the existence of a prior attorney-client relationship and (2) that the former and

current representations are both adverse and substantially related (citations omitted).'" *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 148 (1st Dept 1994), *affd* 87 NY2d 826 (1995), quoting *Solow v Grace & Co.*, 83 NY2d 303, 308 (1994); see also *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636 (1998).

"When the moving party is able to demonstrate each of these [elements], an irrebuttable presumption of disqualification follows" *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 98 (1st Dept 2008) citing *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 (1996), *rearg den.* 89 NY2d 917 (1996). The movant has the burden of establishing these elements in order for an irrebuttable presumption of disqualification to arise, see *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, *supra* at 636. If established, the irrebuttable presumption is imposed in order to "free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation" and to avoid "the 'appearance of impropriety' on the part of the attorney or the law firm." See *Solow v Grace & Co.*, *supra* at 309.

"[D]isqualification motions present competing concerns. Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party's right to representation by counsel of choice and danger that such motions can become tactical

'derailment' weapons for strategic advantage in litigation (*S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]). *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, *supra* at 638.

Gordon contends that based on the current Rules of Professional Conduct (22 NYCRR Part 1200), which became effective on April 1, 2009, and established New York case law, Dechert, Levander and Rowland must be disqualified from representing respondents in the Arbitration, because, based on the facts presented, there was an attorney-client relationship between Gordon and Levander and Rowland, the subject matter in dispute is substantially related to the subject matter of the prior relationship, and Gordon's interests are materially adverse to the interests currently represented by Dechert, Levander and Rowland. Gordon concludes that there is an irrebuttable presumption in favor of disqualification. He also submits that the information he allegedly disclosed to Levander and Rowland was in fact "confidential" information.

Respondents argue that Gordon was never a client or a prospective client of Levander and Rowland, that Gordon never imparted personal confidences to them, and that Gordon made this motion in bad faith.

"To determine whether an attorney-client relationship exists, a court must consider the parties' actions. . . . While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his...own beliefs or actions" *Pellegrino v Oppenheimer & Co. Inc.*, *supra* at 99, citing *Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451 (1993), *lv den.* 82 NY2d 654 (1993).

Respondents contend that Gordon talked with SkyLink's outside counsel - Levander and Rowland - in his capacity as attorney for SkyLink, and not on his own behalf. It is clear that "[u]nless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees" *Talvy v American Red Cross in Greater N.Y.*, *supra* at 149. See also *Veritas Capital Mgt., L.L.C. v Campbell*, 22 Misc 3d 1107[A] at *5-6 (Sup Ct, NY County 2008), *affd sub nom Campbell v McKeon*, 75 AD3d 479 (1st Dept 2010).

The facts presented here, including Gordon's own words and several e-mails annexed to respondents' papers, support the conclusion that Gordon was never Levander's or Rowland's client or prospective client. In this regard, the record supports Levander and Rowland's claim that Gordon's communications concerned only SkyLink corporate matters, which communications Gordon initiated not

on his own behalf, but on the company's behalf in his capacity as employee. That Levander and Rowland reviewed the SkyLink agreements and explained the various provisions to Gordon is entirely consistent with their role as outside counsel for the Skylink entities.

Gordon fails to present any evidence, other than conclusory claims, that Levander or Rowland affirmatively assumed a duty to represent Gordon personally. See *Campbell v McKeon, supra*; *Omansky v 64 N. Moore Assoc.*, 269 AD2d 336 (1st Dept 2000). It should be noted that Levander and Rowland have always represented Skylink entities, and this is not a situation where a law firm has changed sides, from a former client to a current client whose interests are adverse, see *Veritas Capital Mgmt. L.L.C. v Campbell, supra* at *7.

Therefore, because Gordon cannot prove the first of the three required factors, the irrebuttable presumption of disqualification does not arise.

Nor do the facts support Gordon's claim that he disclosed any confidential material or other personal confidences to Levander or Rowland. "A party seeking disqualification of an attorney based on the disclosure of confidential information previously made to the attorney, ... has the burden of identifying the 'specific

confidential information imparted to the attorney' (citations omitted)." *Muriel Siebert & Co., Inc. v Intuit Inc.*, 32 AD3d 284, 286 (1st Dept 2006), *affd* 8 NY3d 506 (2007). Here, Gordon does not meet this burden; he has provided only conclusory statements that he disclosed confidential information to Levander or Rowland and fails to specify what such communications were. Moreover, since Gordon knew that Levander and Rowland were counsel for SkyLink, Gordon could not have had a reasonable expectation of confidentiality in his dealings with them, *see Volo Logistics LLC v Varig Logistica S.A.*, 51 AD3d 554, 555 (1st Dept 2008).

Accordingly, based on the papers submitted and the oral argument held on the record on November 24, 2009, this Court finds that Gordon has failed to meet his burden of presenting any evidence to support his request for disqualification. The petition is, therefore, denied in its entirety.

Conclusion

It is ORDERED and ADJUDGED that petitioner's motion to disqualify the law firm of Dechert LLC, Andrew J. Levander, Esq., Adam B. Rowland, Esq. and all other partners, associates and employees of Dechert LLC from representing any of the respondents in connection with the arbitration entitled *Gordon v SkyLink Aviation, Inc., et al.*, 50 517 T 00228 09, pending before the

American Arbitration Association in New York City is denied; and it is further

ADJUDGED that the petition is dismissed, without costs or disbursements; and it is further

ADJUDGED that the stay of the above-mentioned Arbitration is vacated and the parties shall proceed to Arbitration forthwith, upon service of a copy of this judgment on the Arbitral Tribunal.

This constitutes the decision and Judgment of this Court.

Dated: September 7, 2010



BARBARA R. KAPNICK
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**



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FILED

SEP 13 2010

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Index No. 111401/09

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

IN THE MATTER OF THE APPLICATION OF

ALAN D. GORDON

PETITIONER,

For an Order, Pursuant to CPLR Article 75, Disqualifying
the Law Firm of Robert L. P. H. & Associates, P.C.,
Adam B. Lumbard, Esq., et al., as Attorneys for Respondents

AGAINST -
Skylink Aviation, Inc.; Walter Anbil;
Suzette Bulva And Maurice King
Defendants. Respondents

Judgment

FILED
AT N.Y., CO. CLK'S OFFICE
SEP. 13 2010
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