

**Kalish v Fernandez**

2011 NY Slip Op 32716(U)

October 14, 2011

Supreme Court, Nassau County

Docket Number: 006179-11

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**SOLOMON KALISH and ADEX MANAGEMENT  
CORP., individually and derivatively as members of  
MRI ENTERPRISES, LLC**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Plaintiffs,**

**Index No: 006179-11  
Motion Seq. No. 3  
Submission Date: 9/13/11**

**- against -**

**BENITO FERNANDEZ, HORIZONS INVESTMENT  
CORP., WARMINSTER INVESTMENT CORP.,  
ALLAN HAUSKNECHT, M.D., COMPREHENSIVE  
IMAGING OF NEW YORK, PLLC, and MRI  
ENTERPRISES, LLC,**

**Defendants.**

-----X

**The following papers have been read on this motion:**

- Notice of Motion, Affidavits in Support and Exhibits.....X**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....X**
- Reply Affidavits in Further Support and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Plaintiffs Solomon Kalish ("Kalish") and Adex Management Corp. ("Adex"), individually and derivatively as members of MRI Enterprises, LLC ("MRI-LLC") on May 16, 2011, which was submitted on September 13, 2011, following oral argument before the Court. For the reasons set forth below, the Court denies Plaintiffs' motion.

## BACKGROUND

### A. Relief Sought

Plaintiffs move for an Order, pursuant to Rule 1.9 of the Rules of Professional Conduct, immediately disqualifying the law firm of Jaspan Schlesinger LLC (“Jaspan Law Firm”), and any attorneys working for the Jaspan Law Firm, from representing any of the Defendants in this case.

Defendants oppose Plaintiffs’ motion.

### B. The Parties’ History

The parties’ history is set forth in detail in a prior decision of the Court dated May 27, 2011 (“Prior Decision”), and the Court incorporates the Prior Decision herein by reference. As noted in the Prior Decision, the Verified Complaint describes this lawsuit as an action for declaratory and injunctive relief, as well as money damages, arising from the alleged breach of certain agreements concerning MRI-LLC and Comprehensive Imaging of New York, PLLC (“CINY”). Kalish is the owner of Adex, which is a member of MRI-LLC with a 20% ownership interest. Until his removal in March of 2011, Kalish was also the President of MRI-LLC and administrator of CINY. Horizons is a member of MRI-LLC with a 40% ownership interest. Fernandez owns and controls Horizons and Warminster. Hausknecht, a physician, is a member of MRI-LLC with a 20% ownership interest. Hausknecht owns CINY, a professional medical corporation.

In or about 2000, Kalish entered into an agreement with Hausknecht and Fernandez, as well as non-party Luciano Bonanni (“Bonanni”), for the purpose of establishing a business that provided MRI diagnostic services to patients in hospitals. In 2005, following Bonanni’s removal from the business, the remaining members of MRI-LLC and CINY designated Kalish as the Administrator of CINY and President of MRI-LLC, and promised that he would be compensated for those services. Plaintiffs allege that, in 2005, Fernandez and Hausknecht improperly ousted Bonanni from the business. That dispute is the subject of a lawsuit pending in the Supreme Court of Suffolk County titled *Luciano Bonanni and MRI Enterprises, Inc., individually and as a member of MRI Enterprises, LLC v. Horizon Investors Corp., Benito Fernandez a/k/a B.R. Fernandez, Adex Management Corp., Solomon Kalish, Allan Hausknecht, M.D.*, Suffolk County Index Number 17029-05 (“Related Action”), which was filed on July 18, 2005. In the above-

captioned action before this Court (“Instant Action”), filed on April 26, 2011, Plaintiffs allege that Defendants fired Kalish improperly in 2011, and have deprived him of money to which he is entitled pursuant to the parties’ agreements.

In support of Plaintiffs’ motion to disqualify the Jaspan Law Firm, Kalish provides a copy of the complaint in the Related Action (Ex. B to Kalish Aff. in Supp.) and affirms that, since the commencement of the Related Action in 2005, the Jaspan Law Firm has represented all of the defendants in the Related Action. Kalish affirms that, during that six year period, he has “worked closely with the attorneys and representatives of the Jaspan Law Firm, who were my lawyers in the [Related] Lawsuit” (Kalish Aff. in Supp. at ¶ 13). That work included 1) attending meeting and participating in discussions with the Jaspan attorneys; and 2) disclosing his views and strategies on certain issues which, Kalish submits, are also relevant in the Instant Action.

Kalish submits that a comparison of the complaints in the Instant and Related Actions reveals a similarity of issues including the origins of the companies’ MRI business, the history of the companies, the agreements among the owners and the relationship among the companies and hospitals. When the dispute which prompted the Instant Action arose, Kalish advised the Jaspan Law Firm that he no longer wanted them to represent him. Purportedly due to their recognition of a conflict, the Jaspan Law Firm sought permission to withdraw as counsel for Kalish and Adex in the Related Action, and that application was granted by decision dated April 25, 2011 (Kalish Aff. in Supp. at Ex. C).

In Opposition, Hausknecht affirms that the firing of Kalish, which prompted the Instant Action, was not publicly disclosed until March of 2011. Thus, none of the claims in the Related Action, which was commenced in 2005, involve the appropriateness of that firing. Moreover, Bonanni and MRI Enterprises, Inc., the plaintiffs in the Related Action, are not parties in the Instant Action. In addition, any confidences and/or secrets that were conveyed to the Jaspan Firm in connection with the Related Action were also known to Hausknecht and Fernandez.

Hausknecht notes, further, that the counterclaims asserted the Related Action (Ex. C to Hausknecht Aff. in Opp.) relate to Bonanni’s involvement in a company known as the Fonar Corporation, of which Bonanni is Vice President, and his alleged breach of his duty of loyalty to defendants as a result of his loyalty to Fonar. In the counterclaims, the defendants in the Related

Action allege that MRI Enterprises, Inc., by Bonanni, “took actions which were for the benefit of Bonanni and Fonar, and to the detriment of [MRI-LLC]” (Counterclaims at ¶ 318), including “relentlessly pursu[ing] the Hospitals in an attempt to have their administrators agree to install only Fonar equipment” (*id.*). These claims are not involved in the Instant Action.

### C. The Parties’ Positions

Plaintiffs submit that disqualification of the Jaspan Law Firm is appropriate in light of the fact that 1) the Instant and Related Actions are substantially related, in that they involve the same companies and businesses, many of the same issues, and the same kinds of claims; 2) the Jaspan Law Firm represented Kalish and Adex in the Related Action; and 3) Kalish’s interest in the Related Action is adverse to his interest in the Instant Action, by virtue of his being aligned with Hausknecht and Fernandez in the Related Action, but adverse to them in the Instant Action.

Defendants oppose Plaintiffs’ motion, submitting that the claims in the Related Action “involve wholly different events that took place[] years ago” (Schlesinger Aff. in Opp. at ¶ 17). Defendants note that the claims in the Related Action involve claims relating to Fonar equipment, while the claims in the Instant Action related to Kalish and Adex’s claims that they were improperly removed from CINY and MRI-LLC. Moreover, even assuming *arguendo* that there is a substantial relationship between the two Actions, Plaintiffs have failed to establish that the Jaspan Firm received, or was in a position to receive, privileged information that would benefit Defendants in the Instant Action.

### RULING OF THE COURT

A party’s valued right to be represented in ongoing litigation by counsel of its own choosing should not be abridged, absent a clear showing that disqualification is warranted. *Horn v. Municipal Information Services, Inc.*, 282 A.D.2d 712 (2d Dept. 2001), citing *Olmoz v. Town of Fishkill*, 258 A.D.2d 447 (2d Dept. 1999); *Feeley v. Midas Props.*, 199 A.D.2d 238 (2d Dept. 1993). Accordingly, the movant has the burden of establishing grounds for the disqualification of Defendant’s counsel. *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123, 131 (1996), *rearg. den.*, 89 N.Y.2d 917 (1996); *Solow v. W.R. Grace Co.*, 83 N.Y.2d 303, 308 (1994); *see also, S & S Hotel Ventures, Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445 (1987). A party seeking disqualification of opposing counsel must establish that (1) there is a prior attorney-client relationship between the moving party and opposing counsel; (2) the matters

involved in both representations are substantially related; and (3) the interests of the current client and former client are materially adverse. *M.A.C. Duff, Inc. v. ASMAC, LLC*, 61 A.D.3d 828 (2d Dept. 2009) citing *Tekni-Plex, Inc. v. Meyner and Landis*, *supra*, at 131; *Calandriello v. Calandriello*, 32 A.D.3d 450, 451 (2d Dept. 2006); *Columbus Constr. Co., Inc. v. Petrillo Bldrs. Supply Corp.*, 20 A.D.3d 383 (2d Dept. 2005).

When the moving party can demonstrate each of these factors, an irrebuttable presumption of disqualification follows. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94, 98 (1st Dept. 2008), citing *Tekni-Plex, Inc. v. Meyner and Landis*, *supra*, at 131. Conversely, the movant's failure to make the requisite showing as to each of the criteria means that no such presumption arises. *Pellegrino v. Oppenheimer & Co., Inc.*, *supra*, at 98, citing *Kassis v. Teacher's Ins. & Annuity Assn.*, 93 N.Y.2d 611, 617 (1995); *Tekni-Plex, Inc. v. Meyner and Landis*, *supra*, at 132.

A lawyer should preserve the confidences and secrets of a client and avoid even the appearance of professional impropriety. *Nesenoff v. Dinerstein & Lesser, P.C.*, 12 A.D.3d 427, 428 (2d Dept. 2004), citing Code of Professional Responsibility Canons 4 and 9, and *Cardinale v. Golinello*, 43 N.Y.2d 288 (1977). The duty to preserve client confidences and secrets continues even after representation ends. *Id.*, citing, *inter alia*, *Cardinale*, *supra*. An attorney will be disqualified where the party seeking disqualification meets its burden of establishing a substantial relationship between the issues in the litigation and the subject matter of the prior representation, or where counsel had access to confidential material subsequently related to the litigation. *Id.* at 428-429, citing, *inter alia*, *Glashow v. Linden Towers Coop. # 4*, 288 A.D.2d 257 (2d Dept. 2001).

The Court denies Plaintiffs' motion based on the Court's conclusion that Plaintiffs have not established that the matters involved in the Related and Instant Actions are substantially related. The Court notes that the Related Action was filed in 2005, prior to the allegedly improper termination of Kalish that forms the basis of the Instant Action. Moreover, Bonanni, the plaintiff in the Related Action, is not a party in the Instant Action and his claims in the Related Action are distinct from those asserted in the Instant Action. The Court also denies Plaintiffs' motion in light of Plaintiffs' failure to demonstrate that the Jaspan Law Firm had, as a result of its prior representation of Kalish, access to confidential material that is related to the

Instant Action.

All matters not decided herein are hereby denied.

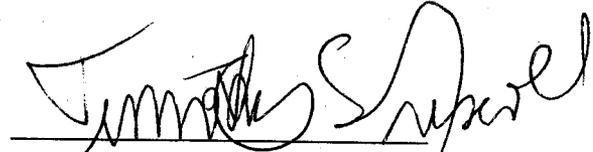
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on December 9, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 14, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
OCT 20 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE