

Grovick Props., LLC v 83-10 Astoria Blvd. LLC

2012 NY Slip Op 30593(U)

February 27, 2012

Supreme Court, Nassau County

Docket Number: 600794-10

Judge: Timothy S. Driscoll

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
GROVICK PROPERTIES, LLC,

Plaintiff,

-against-

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 600794-10
Motion Seq. No. 4
Submission Date: 12/21/11**

**83-10 ASTORIA BOULEVARD LLC; JANE PERLOW,
Individually and as Trustee of the SIDNEY ESIKOFF
GRAT # 1; GRACE HAVASY, Individually and as
Trustee of the SIDNEY ESIKOFF GRAT # 1; MARION
STERNBERG, Individually and as Trustee of the
SIDNEY ESIKOFF GRAT # 1; SIDNEY ESIKOFF,
Individually and as Trustee of the SIDNEY ESIKOFF
GRAT # 1; and RUSKIN MOSCOU FALTISCHEK, P.C.,
as Escrow Agent,**

Defendants.

-----X

Papers Read on these Motions:

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

This matter is before the court on the motion by Defendants filed on or about November 14, 2011 ¹ and submitted on December 21, 2011. For the reasons set forth below, the Court grants the motion to disqualify attorney Jon Schuyler Brooks and the law firm of Phillips

¹ By letter dated November 29, 2011, Defendants' counsel advised the Court that, to preserve the confidentiality of certain communications between Defendants and Mr. Brooks, the contents of certain emails comprising Exhibit K were redacted in their motion. Defendants' counsel provided the Court with a copy of the motion in which these emails were not redacted.

Nizer, LLP from acting as counsel for Plaintiff Grovick Properties, LLC. The Court stays the instant action for a period of thirty (30) days and directs substitute counsel for Plaintiff, and counsel for Defendants, to appear at a conference before the Court on April 5, 2012 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Defendants 83-10 Astoria Boulevard LLC (“Astoria LLC”), Jane Perlow (“Perlow”), Individually and as Trustee of the Sidney Esikoff GRAT # 1, Grace Havasy (“Havasy”), Individually and as Trustee of the Sidney Esikoff GRAT # 1 and Marion Sternberg (“Sternberg”), Individually and as Trustee of the Sidney Esikoff GRAT # 1 move for an Order disqualifying attorney Jon Schuyler Brooks (“Brooks”) and the law firm of Phillips Nizer, LLP (“Phillips Nizer”) from acting as counsel for Plaintiff Grovick Properties, LLC (“Grovick” or “Plaintiff”) in light of an alleged conflict of interest..

Plaintiff oppose Defendants’ motion.

B. The Parties’ History

The parties’ history, including the allegations in the Complaint, is set forth in detail in a prior decision of the Court dated April 11, 2011 (“Prior Decision”) (Ex. N to Weill Reply Aff.) in which the Court denied Plaintiff’s motion for a default judgment, granted Defendants’ cross motion and directed Plaintiff to accept the Amended Verified Answer previously served. The Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, Plaintiff alleges that it is an innocent purchaser of real property (“Premises”) contaminated by petroleum and seeks to recover from the Premises’ prior owners and their operators costs incurred in removing contamination and restoring the Premises to levels that are satisfactory to the New York State Department of Environmental Conservation (“DEC”). Prior to commencing this action, Astoria LLC objected to Grovick’s attempt to recover these costs from a designated escrow account, and refused to compensate Grovick.

In support of the instant motion, Perlow affirms that she is the Managing Member of Astoria LLC, a Trustee of the Sidney Esikoff GRAT # 1, as well as an individually named Defendant in this action. She affirms that Astoria LLC was the owner of the Premises, which had been operated by other parties as a gasoline service station. In November of 2003, Astoria LLC entered into a contract regarding the sale (“Sale”) of the Premises to HJN Hotels Corp., which subsequently assigned to Grovick its interest as the purchaser of the Premises. The closing (“Closing”) of the Sale took place on April 2, 2004, at which time title to the Premises

was transferred to Grovick. During the Sale, Grovick was represented by the law firm of Ruskin Moscou Faltischek, P.C. (“RMF”), and more specifically by Brooks, and Astoria was represented by Lori April, Esq. (“April”).

Havasy, Sternberg and Perlow (“Astoria Members”) are the sole members of Astoria LLC. They retained Brooks and RMF on or about April 14, 2004 to represent Astoria LLC and the Astoria Members in connection with claims by the State of New York (“State”), on behalf of the DEC, stemming from alleged contamination at the Premises (“DEC Claims”). A retainer agreement (Ex. B to Perlow Aff. in Supp.), in the form of a letter dated April 14, 2004 from Brooks, was countersigned by Astoria LLC and the Astoria Members. At Brooks’ insistence, in conjunction with the execution of the retainer agreement, the Astoria Members signed the Waiver (*id.* at Ex. C) so that Brooks could represent Astoria LLC and Grovick in connection with the DEC Claims. Neither Astoria LLC nor the Astoria Members ever signed a subsequent waiver of conflicts letter when Brooks left RMF and joined Phillips Nizer.

At the Closing, Astoria LLC and Grovick entered into an Escrow Agreement pursuant to which Astoria LLC agreed to deposit the sum of \$500,000 in escrow with RMF, as Escrow Agent (“Escrow Funds”). This sum was intended to resolve Astoria LLC’s alleged liability to the State. The sum was to be used solely to satisfy claims made by the State or DEC, and for no other purpose.

Perlow affirms that Grovick purchased the Premises with knowledge of the DEC Claims. She avers, further, that the Astoria Members were “very open and honest” with Brooks (Perlow Aff. in Supp. at ¶ 9) while he represented them regarding the DEC Claims. In addition, she states that Brooks acquired “a substantial amount of personal and confidential information” (*id.* at ¶ 9), including but not limited to the Astoria Members’ finances and their relationship with Defendant Sidney Esikoff.

Perlow affirms that Brooks repeatedly attempted to persuade the Astoria Members to use the Escrow Funds to pay Grovick, instead of using those funds to pay the State or DEC. Perlow avers that it became increasingly apparent that Brooks was acting in the best interests of Grovick, rather than Astoria LLC. Perlow avers that it was never explained to the Astoria Members that Grovick might assert claims against the Defendants individually. She states further that she never anticipated that the Waiver would permit Brooks to represent Grovick in litigation against Astoria LLC and the Astoria Members. Had she known that, she states that she would not have signed the Waiver.

On or about October 12, 2011, Defendants' counsel delivered to Brooks a letter dated June 2, 2011 expressing Defendants' expectation that Brooks would withdraw from the instant litigation (Ex. M to Perlow Aff. in Supp.). Brooks did not respond to the letter or withdraw as counsel for Plaintiff. Perlow expresses her belief that she and her fellow Astoria Members are disadvantaged in this action by Brooks' representation of Plaintiff in light of the confidential and personal information he learned from his past representation of them.² Havasy and Sternberg affirm the truth of the sworn assertions in the Perlow affidavit.

Defendants' counsel notes that the Waiver provides, in pertinent part, as follows:

...Astoria and each of its Members hereby waive any and all claims of conflict of interest or potential conflict of interest that may arise out of the our [sic] representation of Astoria on the one hand, and any work we have performed, now perform, or may perform for Grovick or its principals (including Jeffrey Novick). Furthermore, in the event Astoria at any time for any reason elects to discontinue its engagement of this firm, or should an adverse relationship arise between Astoria and Grovick, you acknowledge and agree that we may continue without restriction to represent Grovick and its principals in any and all matters, including those that arise from or relate to the Premises.

Defendants' counsel affirms that on or about March 20, 2009, the State instituted an action against the Defendant seeking compensation for clean-up costs at the Premises ("State Action"). Brooks represented Astoria and the Individual Defendants at the outset of the State Action and, in that capacity, requested from the State an extension of time to answer the complaint.

Defendants' counsel provides a copy of a November 23, 2009 letter from Brooks to an Assistant Attorney General regarding the State Action (Ex. E to Weil Aff. in Supp.).

Defendants' counsel also provides an email from Brooks to Perlow dated November 20, 2006 (*id.* at Ex. F) which reads, in pertinent part, as follows:

Speaking of money, what I can tell you is that Jeff Novick will be spending MAJOR dollars to takeover the cleanup from the DEC. If the DEC had incurred those costs, they would become costs that DEC would try to recover in the lawsuit. Accordingly, Jeff is entitled to the funds that are now in escrow with [RFM]...

Defendants' counsel also provides emails that Brooks send to Perlow in 2008 and 2009 (Weil Aff. in Supp. at Exs. G and H) in which Brooks recommended that the Escrow Funds be used to pay for the cleanup of the Premises. In an email dated October 21, 2009 (*id.* at Ex. I), Brooks advised the Astoria Members that 1) DEC had stopped incurring cleanup costs;

² Perlow affirms that on October 12, 2011, Plaintiff withdrew its claims against Defendant Sidney Esikoff.

2) at the request of the DEC, Grovick “[r]eluctantly” completed the cleanup; and 3) the parties’ contract of sale regarding the Premises includes a provision giving Grovick the right to reimbursement if its cleanup costs exceeded a particular amount, which has occurred. Brooks advised the Astoria Members that “Our goal, therefore, has been to try to use [the Escrow Funds] to settle not only [the State Action], but also the claims held by Grovick.”

Defendants’ counsel avers that Brooks joined Phillips Nizer in early 2005. On March 30, 2005, Brooks advised Perlow that he would prepare a new engagement letter and waiver of conflict letter for her review, but no such letter was every provided or executed. Thus, Defendants’ counsel submits, no written waiver exists regarding the representation of Grovick by Phillips Nizer and Defendants cannot be deemed to have waived any conflict of interest.

In opposition, Brooks affirms that Plaintiff was represented, during the Sale, by Eric C. Rubenstein, Esq. of RMF, and Astoria LLC and the Astoria Members (“Moving Defendants”) were represented by April. Brooks disputes Defendants’ assertions that he was a member of RMF, and affirms that he never represented Grovick in the negotiations regarding the Sale. Brooks affirms that his involvement “focused upon counseling RMF/Grovick on the environmental aspects of the transaction” (Brooks Aff. in Opp. at ¶ 5), and that he did not attend the Closing.

Brooks avers further that, subsequent to the Closing, Perlow approached Brooks and requested that he represent the Moving Defendants in their dealings with the State and DEC. He states further that, upon information and belief, the Defendants consulted with April prior to executing the Waiver, which all the Moving Defendants executed and whose contents were reiterated in the RMF engagement letter.

Brooks affirms that he joined Phillips Nizer in March of 2005, at which time the Moving Defendants elected to continue having Brooks represent them in their dealings with the State and DEC. Specifically, pursuant to a letter dated March 11, 2005 (Ex. 3 to Brooks Aff. in Opp.), Perlow authorized RMF to “release all of my legal files related to 83-10 Astoria Blvd. LLC to [Brooks] at Phillips Nizer” and requested that the balance of the \$10,000 retainer paid to RMF for Brooks’ services be sent to Phillips Nizer. RMF complied with Perlow’s instructions and by email dated March 30, 2005 (*id.* at Ex. 4), Brooks advised Perlow that the file and check had been received. Perlow responded by email of the same date (*id.*), in which she asked Brooks to deposit the check to the Phillips Nizer account and to send her the new engagement letter.

On or about November 20, 2006, Brooks wrote to Perlow suggesting that his engagement

be terminated, but the Moving Defendants declined that offer. Brooks affirms that he “rendered no meaningful services to the Moving Defendants between March 2005 and February 19, 2009” (Brooks Aff. in Opp. at ¶ 14).

On February 19, 2009, as a result of DEC activity regarding the Premises, Brooks and Perlow spoke and Brooks confirmed their conversation in an email dated February 19, 2009 (*id.* at Ex. 6). In that email, Brooks confirmed *inter alia*, that 1) he remained authorized to represent Astoria LLC with regard to any claim made by the DEC or State; and 2) he was authorized to try to settle any State/DEC claim, provided he obtained a release for the Moving Defendants.

The State Action was subsequently filed and served on Havasy on May 23, 2009. On that date, Perlow sent an email to Brooks (Ex. 7 to Brooks Aff. in Opp.) in which she reiterated her expectation that Brooks would represent “the three sisters individually, three sisters as trustees of Sidney Esikoff Grat #1...and 83-10 Astoria Blvd LLC, ONLY.” Perlow’s email also stated her desire to expedite the matter “without involvement with other parties named in [the] summons of March 20, 2009.” Brooks affirms that Grovick was not, and is not, a party in the State Action. Due to the Moving Defendants’ instructions to Brooks that they wished to settle, rather than litigate, the State Action, Brooks never entered an appearance in the State Action.

Brooks notes that the Moving Defendants never previously suggested that Brooks, or Phillips Nizer, should be disqualified from representing Grovick. Brooks further submits that Moving Defendants have had numerous opportunities to raise this issue, including in their prior cross motion to compel Grovick to accept their Answer, and in the papers they submitted in connection with a prior motion to consolidate the instant action with the State Action.

In reply, Defendants dispute Plaintiff’s claim that Defendants have unduly delayed their application to disqualify Brooks and Phillips Nizer. Defendants note that it was Plaintiff who initiated motion practice by moving for a default judgment, which the Court denied in the Prior Decision. In addition, on or about May 17, 2011, Defendant Sidney Esikoff passed away and the proceedings were stayed pending the appointment of a personal representative for Mr. Esikoff’s estate. On October 12, 2011, without prior notice, Plaintiff discontinued this action against Sidney Esikoff and the Court determined, in light of that discontinuance, that a stay of this action was not appropriate. Defendants’ counsel advised Plaintiff’s counsel on October 12, 2011, prior to Plaintiff’s discontinuance of the action against Sidney Esikoff, of Defendants’ intention to move to disqualify Brooks.

Defendants also disagree with Plaintiff’s assertion that Defendants waived any and all

conflicts of interest by virtue of their execution of the letter of engagement and waiver of conflicts letter with RMF. That correspondence does not reflect Defendants' waiver of their right to object to Brooks' representation of Plaintiff in an action against them individually.

Finally, Defendants dispute Plaintiff's claim that the State Action and instant action are not substantially related. According to Defendants, the Escrow Fund to which the Complaint in the instant action refers was created to satisfy any liability owed to the State and, therefore, is also central to the State Action.

The Parties' Positions

Defendants submit that 1) the Court should disqualify Brooks and Phillips Nizer from representing Grovick, or any other party, in any action against Astoria LLC and the Individual Defendants on the ground that such representation violates Rule 1.7 of the Rules of Professional Conduct as Grovick's interests were materially adverse to those of Astoria LLC as of the date when Grovick contracted with Astoria LLC to purchase the Premises and, therefore, his dual representation of Grovick and Astoria is void *ab initio*; 2) the waiver entered into by Defendants and RMF only applied to RMF, not Phillips Nizer; and 3) the Court should disqualify Brooks and Phillips Nizer from representing Grovick in any action against Astoria LLC and the Individual Defendants on the ground that such representation violates Rule 1.9 of the Rules of Professional Conduct because the issues in the instant action are substantially related to the issues involved in Brooks' former representation of the Defendants in their negotiations with the State and DEC and there exists a reasonable probability of disclosure of confidential information.

Plaintiff opposes Defendants' motion. Plaintiff submits *inter alia* that 1) to the extent that the Moving Defendants had the right to seek disqualification of Brooks and/or Phillips Nizer, they waived that right by failing to bring this motion until over a year after this action was filed; 2) the Moving Defendants waived in writing all conflicts concerning Brooks' representation of Grovick by executing the April 14, 2004 Waiver; 3) the Moving Defendants reaffirmed the Waiver following Brooks' relocation to Phillips Nizer by not objecting to Brooks' July 21, 2008 email in which he reiterated the necessity of the Waiver as a condition of his continued representation of the Moving Defendants, and affirming their engagement of Brooks; 4) the instant action is not substantially related to the State Action, as demonstrated by the Court's prior denial of the motion to consolidate on the grounds that there was not a complete identity of parties or claims in the two Actions; and 5) the Moving Defendants provided no

confidential information to Brooks.

RULING OF THE COURT

A. Disqualification of Counsel

Although a party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right that should not be abridged, such right will not supersede a clear showing that disqualification is warranted. *Scopin v. Goolsby*, 88 A.D.3d 782, 784 (2d Dept. 2011), citing *Matter of Marvin Q.*, 45 A.D.3d 852, 853 (2d Dept. 2007), *app. disp.*, 10 N.Y.3d 927 (2008), quoting *Campolongo v. Campolongo*, 2 A.D.3d 476 (2d Dept. 2003). A party seeking disqualification of its adversary's lawyer must prove: 1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, 2) that the matters involved in both representations are substantially related, and 3) that the interests of the present client and former client are materially adverse. *Id.*, quoting *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131 (1996), *reh. den.*, 89 N.Y.2d 917 (1996).

Scopin involved a collision between a vehicle operated by plaintiff and a bus operated by the Metropolitan Suburban Bus Authority and operated by the defendant. 88 A.D.3d at 783. The plaintiff and a passenger in her vehicle met with an attorney who advised plaintiff that his law firm could not file a complaint for both plaintiff and her passenger and that one of them would have to retain her own counsel. *Id.* The law firm, however, served a notice of claim on behalf of both the plaintiff and her passenger identifying itself as their attorneys. The plaintiff later retained separate counsel and the law firm continued as counsel for the passenger. *Id.*

Subsequently, counsel for plaintiff and counsel for her passenger commenced separate actions against the bus company and its driver. The bus defendants raised as an affirmative defense, in both actions, that the collision had been caused by the plaintiff. The bus defendants moved to disqualify counsel for the passenger from representing any party in the actions. In opposition, the passenger submitted an affidavit from the plaintiff asserting that, during her prior consultation with the passenger's counsel, she did not reveal any information that would adversely affect her separate action as a plaintiff, and she did not believe that any conflict of interest existed from her consultation with the passenger's attorney. The passenger submitted an affidavit in which she stated that she had instructed her counsel not to name plaintiff as a defendant in the passenger's action, and that she adhered to that position even after its legal ramifications were explained to her. *Id.*

The trial court denied the bus defendants' motion to disqualify counsel for the passenger.

Id. Thereafter, the plaintiff moved to disqualify counsel for the passenger in the passenger's action against the bus defendants on the ground that the passenger's law firm had a conflict of interest and the trial court denied that motion. *Id.* at 784.

The Second Department reversed, noting that although the passenger had originally instructed her counsel not to name plaintiff as a defendant in the passenger's action against the bus defendants, she subsequently changed her position and filed an amended complaint naming plaintiff as a defendant. *Id.* The Second Department concluded that plaintiff had established that the interests of the passenger were now in direct conflict with those of the plaintiff, the firm's former client. *Id.* Thus, it was an improvident exercise of discretion for the trial court to deny the motion to disqualify the passenger's counsel. *Id.*

B. Application of these Principles to the Instant Action

In light of the procedural history of this action, the Court cannot conclude that Defendants have waived the conflict although there was some delay in the filing of this motion. That history includes a motion by Plaintiff for a default judgment based on Plaintiff's contention that Defendants' Verified Answer was untimely and inadequately verified, which the Court denied, and the stay of this action pending the appointment of a personal representative for Mr. Esikoff's estate. Moreover, Defendants' counsel affirms that in October of 2011, he delivered a letter to Brooks expressing Defendants' expectation that Brooks would withdraw from the instant litigation, but Brooks declined to withdraw from the action, necessitating the instant motion. Under all the circumstances, the Court cannot conclude that Defendants have waived the conflict.

The Court concludes that disqualification of Brooks and Phillips Nizer as counsel for Plaintiff is appropriate. The moving papers establish that 1) there was a prior attorney-client relationship between the Moving Defendants and Brooks, 2) the matters involved in both representations are substantially related, and 3) the interests of the Plaintiff and Moving Defendants are materially adverse.

There was clearly a prior attorney-client relationship between the Moving Defendants and Brooks. Moreover, the Court concludes that the matters involved in the two representations are substantially related, as the State Action and instant action both pertain to the contamination at the Premises and the determination of the parties' financial obligation to clean up that contamination. The Court's exercise of its discretion in denying the consolidation motion did not constitute a determination that the two matters are not substantially related in this context,

and the Court concludes that they are.

It is uncontroverted that Brooks obtained the written Waiver from the Moving Defendants, and reiterated the Wavier upon his relocation to Phillips Nizer. The Court concludes, however, that the parties' interests are materially adverse in light of the fact that Plaintiff is asserting its entitlement to the Escrow Funds provided by the Defendants. The Court notes that in the email dated October 21, 2009, which is detailed earlier in the decision, Brooks advised the Astoria Members that Grovick had assumed responsibility for the cleanup at the Premises and stated that their "goal" was to try to use the Escrow Funds to settle not only the State Action, but also Grovick's claims. If Brooks were permitted to continue his representation, the Court would be countenancing Brooks' seeking a determination that the Escrow Funds, which the Moving Defendants created to fund their obligations if any to the State or DEC, should instead be awarded to the Plaintiff. The Court concludes that the interests of Plaintiff and the Moving Defendants are now in direct conflict, and that it would be an improvident exercise of discretion for the Court to deny the motion to disqualify Plaintiff's counsel.

Accordingly, the Court grants the motion, stays the instant action for a period of thirty (30) days and directs substitute counsel for Plaintiff, and counsel for Defendants, to appear at a conference before the Court on April 5, 2012 at 9:30 a.m.

All matters not decided herein are hereby denied.

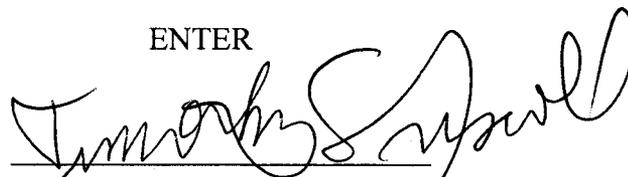
This constitutes the decision and order of the Court.

The Court reminds Plaintiff and counsel for Defendants of the required appearance of substitute counsel for Plaintiff, and counsel for Defendants, at a conference before the Court on April 5, 2012 at 9:30 a.m.

DATED: Mineola, NY

February 27, 2012

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAR 07 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE