Matter of Polish S.S. Co. v Bay Ocean Mgt., Inc.
2000 NY Slip Op 30010(U)
January 6, 2000
Supreme Court, New York County
Docket Number: 604130/99
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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In the Matter of the Arbitration
Between

POLISH STEAMSHIP COMPANY and ZEGLUGA POLSKA, S.A.,

Petitioners,

Index No. 604130/99

-against-

Sequence No. 001

BAY OCEAN MANAGEMENT, INC.,

Respondent.

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Louis B. York, J.:

By Order to Show Cause dated September 2, 1999, petitioners Polish Steamship Company ("Polsteam") and Zegluga Polska S.A. ("Zegluga") seek an order: 1) disqualifying the law firm of Seward & Kissel LLP ("Seward & Kissel") from representing respondent Bay Ocean Management, Inc. ("Bay Ocean") in an arbitration proceeding in New York County before the Society of Maritime Arbitrators entitled In The Matter of the Arbitration between Polish Steamship Company and Zegluga Polska S.A.-and-Bay Ocean Management, Inc.; and 2) enjoining, pendente lite, Seward & Kissel from representing and taking any action on behalf of Bay Ocean in the arbitration proceeding.

According to petitioners, Polsteam is a Polish corporation engaged, inter alia, in the operation of ocean-going vessels for the carriage of freight. Zegluga is a Polish corporation also engaged, inter alia, in the operation of ocean-going vessels for the carriage of freight. Bay Ocean is a Delaware corporation

engaged, inter alia, in the management of ocean-going vessels.

Petitioners state that Polsteam and Bay Ocean entered into two written joint venture agreements. Pursuant to the first agreement, dated April 30, 1991, Polsteam and Bay Ocean formed the Baltic-Atlantic Shipping Company V.O.F. ("BASC"), a Netherlands Antilles general partnership. Thereafter, pursuant to an agreement dated February 26, 1993, Polsteam, Zegluga and Bay Ocean form the Baltic-Atlantic Shipping Company II V.O.F. ("BASC II"), also a Netherlands Antilles general partnership. BASC and BASC II each have issued to them certificates representing shares in certain subsidiary corporations organized under the laws of the Marshall Islands (the "Marshall Islands Corporations"). The purpose of each of the Marshall Islands Corporations is to own and operate a single ocean-going vessel and each corporation was named for the vessel that it owned. Pursuant to individual Vessel Management Agreements, Bay Ocean managed each vessel on behalf of whichever joint venture, BASC or BASC II, owned the given vessel.

According to petitioners, at various times, Seward & Kissel acted as the attorney for BASC and BASC II and for the Marshall Islands Corporations on various matters, including the sale and financing of vessels for the individual Marshall Islands corporations. Petitioners assert that Seward & Kissel also performed legal services directly for Polsteam on issues arising from BASC and BASC II and the Marshall Islands Corporations.

Petitioners state that, at some point, a dispute arose between Polsteam and Zegluga on the one hand and Bay Ocean on the

other, concerning, inter alia: 1) the management of the vessels owned by the Marshall Islands Corporations; 2) an accounting of the revenues earned by the individual vessels and the Marshall Islands Corporations, and, ultimately, by BASC and BASC II; and 3) the composition of the Boards of Directors and Officers of each of the individual Marshall Islands Corporations. Both of the Joint Venture agreements as well as the individual Vessel Management Agreements provided for submission of all disputes to arbitration.

By letter dated June 18, 1999, Polsteam and Zegluga notified Bay Ocean of their demand for arbitration in New York, pursuant to the agreements. By letter dated June 28, 1999, Seward & Kissel appeared on behalf of Bay Ocean, denying that Bay Ocean: 1) was in breach of the Joint Venture agreements; 2) had failed to provide reports and other documents pursuant to the Vessel Management Agreements; and 3) had failed to cooperate in issues of corporate governance and structure, including the changing of members of the boards of directors of the individual Marshall Islands corporations.

In letters dated June 29, 1999 and August 11, 1999, Polsteam and Zegluga requested that Seward & Kissel withdraw from representing Bay Ocean in the arbitration because a conflict existed with Seward & Kissel's current and prior representation of Polsteam, BASC, BASC II and the Marshall Islands Corporations. However, in letters dated July 7, 1999 and August 12, 1999, Seward & Kissel declined to withdraw as counsel for Bay Ocean,

stating that no conflict existed, and asserting that even when counsel for a joint venture represents one of the joint venturers in a subsequent dispute. Petitioners now seek an order disqualifying Seward & Kissel as counsel for Bay Ocean in the arbitration proceeding.

Whether to disqualify an attorney from representing a client raises two competing but important concerns. On the one hand, "[d]isqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." (Tekni-Plex v. Meyner & Landis, 89 NY2d 123, 131; see, Solow v Grace & Co., 83 NY2d 303, 309-310; S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 443). Moreover, disqualification motions are sometimes used by a party in an effort to gain a strategic advantage over his or her adversary. (Tekni-Plex v. Meyner & Landis, 89 NY2d at 133-134; see, S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d at 443).

On the other hand, it is well-settled that "[a]ttorneys owe fiduciary duties of both confidentiality and loyalty to their clients." (Tekni-Plex v. Meyner & Landis, 89 NY2d at 130; see, Solow v Grace & Co., 83 NY2d at 306). Thus, "[a]s a general rule, where an attorney represents multiple clients and a situation arises posing a potential conflict between them in connection with his representation, he may not undertake the representation of either against the other unless it is shown either that no

actual conflict exists or that such continued involvement is with the full consent of all parties upon complete disclosure." (Matter of Hof, 102 AD2d 591; see Bianchi v. Mille, ___ AD2d ___, ___ NYS2d ___, 12/1/99 NYLJ p. 32 at col.2 [2d Dept. 1999]; Dolgoff v. Projectvision, Inc., 235 AD2d 311). Moreover, attorneys "'must avoid not only the fact, but even the appearance, of representing conflicting interests.'" (Tekni-Plex v. Meyner & Landis, 89 NY2d at 130; Cardinale v. Golinello, 43 NY2d 288, 296; see also, Code of Professional Responsibility Canon 9).

"Even after representation has concluded, a lawyer may not reveal information confided by a former client, or use such information to the disadvantage of the former client or the advantage of a third party. (Tekni-Plex v. Meyner & Landis, 89 NY2d at 130, citing, Code of Professional Responsibility DR 4-101 [B] [22 NYCRR 1200.19 (b)]; see also, Code of Professional Responsibility DR 5- 108 [A] [2] [22 NYCRR 1200.27 (a) (2)]). "In accordance with these duties, the Code [of Professional Responsibility] precludes attorneys from representing interests adverse to a former client on matters substantially related to the prior representation." (Tekni-Plex v. Meyner & Landis, 89 NY2d at 130). DR 5-108 provides that:

> (A) Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client."

(See, Tekni-Plex v. Meyner & Landis, 89 NY2d at 130-131). Therefore, when a party seeks to disqualify its adversary's attorney under DR 5-108 (A)(1), it 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 (Tekni-Plex v. Meyner & Landis, 89 NY2d at 131; see, Solow v Grace & Co., 83 NY2d at 308). "Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification." (Tekni-Plex v. Meyner & Landis, 89 NY2d at 131; see, Solow v Grace & Co., 83 NY2d at 309).

In the case at hand, petitioners initially assert that Seward & Kissel must be disqualified because it continues to directly represent Polsteam on matters outside of BASC or BASC II. In response, Seward & Kissel acknowledges that from July of 1997 to November of 1998, it represented Polsteam with respect to five transactions. However, it asserts that those transactions were unrelated to BASC or BASC II, and that they are no longer ongoing. Although Polsteam asserts that Seward & Kissel continues to represent them in matters outside of the joint ventures, it has not set forth evidence of any specific matters, unrelated to the joint ventures, in which it is currently represented by Seward & Kissel. Therefore, petitioners have not demonstrated that Seward & Kissel should be disqualified merely because of its prior representation of Polsteam.

Petitioners have demonstrated, however, that Seward & Kissel must be disqualified because its representation of Bay Ocean in the arbitration proceeding against Polsteam and Zegluga conflicts with its continuing representation of BASC and BASC II, in which Polsteam and Zegluga are co-venturers with Bay Ocean.

First, it is clear that Seward & Kissel has represented the joint ventures for many years. Seward & Kissel states that it has represented Bay Ocean for more than six years in over thirty transactions. Significantly, Seward & Kissel concedes that in approximately three-quarters of those transactions, it represented Bay Ocean while Bay Ocean was acting in its capacity as the managing joint venturer either for BASC, in which Polsteam was the co-venturer with Bay Ocean, or for BASC II, in which Polsteam and Zegluga were the co-venturers with Bay Ocean. According to Seward & Kissel, its legal services involved the organization of the Marshall Islands corporations, which were organized by the joint venturers as a means of operating various ocean-going vessels. Seward & Kissel also aided the joint venturers in negotiating and preparing the legal documentation needed to effectuate the purchase and financing of the vessels by the various Marshall Islands corporations. Thus, it is clear that the services provided by Seward & Kissel were on behalf of the joint ventures and not merely for Bay Ocean.

Second, neither Bay Ocean nor Seward & Kissel deny petitioner's contention that Seward & Kissel's fees for its services to BASC and BASC II were paid with funds from the joint

ventures, rather than from Bay Ocean's own funds. Respondents merely assert that, even if true, this would not create an attorney-client relationship between the firm and Polsteam or Zegluga.

Finally, neither Bay Ocean nor Seward & Kissel denies petitioners' contention that Seward & Kissel continues to represent BASC and BASC II. Therefore, the court finds that since Seward & Kissel continues to represent the two joint ventures in which petitioners are members, it is inappropriate for the firm to represent petitioners' co-venturer, Bay Ocean, in an adversarial proceeding which arises from the operation of the joint ventures and the agreements which govern them. (See, Bianchi v. Mille, ___ AD2d ___, ___ NYS2d ___, 12/1/99 NYLJ p. 32 at col.2 [2d Dept. 1999]; Dolgoff v. Projectvision, Inc., 235 AD2d 311; Matter of Hof, 102 AD2d 591). The court also notes that the appearance of a conflict is especially heightened in this case because Seward & Kissel has previously represented Polsteam on at least five occasions outside of the joint ventures.

Bay Ocean argues that petitioners are attempting to gain a strategic advantage here by moving to disqualify its counsel on the eve of the arbitration. However, as noted above, petitioners notified Bay Ocean of their belief that a conflict existed and requested that Seward & Kissel withdraw as counsel on June 29, 1999, the day after the firm first appeared on behalf of Bay Ocean in regards to the arbitration. Petitioners reiterated that request on August 11, 1999 and when it was not honored, they

promptly moved on September 2, 1999 to disqualify Seward & Kissel as counsel. Therefore, it cannot be said that petitioners have attempted to gain an unfair advantage by requesting the relief sought herein. Accordingly, it is

ORDERED that petitioners' motion to disqualify the law firm of Seward & Kissel from representing respondent in the arbitration proceeding entitled In The Matter of the Arbitration between Polish Steamship Company and Zegluga Polska S.A.-and-Bay Ocean Management, Inc. is granted.

DATED: 1/6/00

ENTER:

J.S.C.

LOUIS B. YORK

FILED

JAN 19 2000

COUNTY CLERK'S OFFICE
NEW YORK