

Nesenoff v Dinerstein & Lesser, P.C.

2003 NY Slip Op 30062(U)

June 19, 2003

Supreme Court, Suffolk County

Docket Number: 0005717/5717

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA,**
Justice

RABBI DAVID NESENOFF,

Plaintiff(s),

- against -

DINERSTEIN & LESSER, P.C. and ROBERT
DINERSTEIN,

Defendant(s).

CASE DISPOSED: No
MOTION R/D: 02/26/03
SUBMISSION DATE: 03/21/03
MOTION SEQUENCE No.: 002 MG

ATTORNEY FOR PLAINTIFF
The Saunders Law Firm
609 Fifth Avenue
New York, New York 10017

ATTORNEY FOR DEFENDANTS
Matthew K. Flanagan, Esq.
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Garden City, New York 11530

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated February 6, 2003; Affirmation dated February 6, 2003; Exhibits A and B annexed thereto; Affirmation in Opposition dated February 16, 2003; Reply Affirmation dated February 25, 2003; Plaintiffs Memorandum of Law; and upon due deliberation; it is

ORDERED, that the motion by plaintiff, pursuant to Code of Professional Responsibility, Canons 4 and 9, for an Order disqualifying the law firm of L'Abbate, Balkan, Colavita & Contini, LLP, from representing the defendants in this action, is granted.

The instant action was commenced by Rabbi David Nesenoff against his former attorneys for breach of fiduciary duty, breach of contract, intentional infliction of emotional distress, and interference with prospective advantage.

In or around July **1992**, the Oyster Bay Jewish Center (“OBJC”) hired plaintiff, Rabbi Nesenoff, to serve as its rabbi. After a dispute arose regarding remuneration, the plaintiff left OBJC in July **1998** and was subsequently hired by the East Northport Jewish Center (“ENJC”) to serve as its rabbi in August **1998**.

In October **1998**, the plaintiff retained the defendants to represent him in an action against OBJC. The defendants, on behalf of plaintiff, commenced an action against OBJC, and others, in July **1999**, alleging nine causes of action. OBJC appeared in the action and was represented by the law firm, L’Abbate, Balkan, Colavita & Contini, LLP (“L’Abbate”). During the course of the legal representation, the plaintiff provided the defendants with his entire files with respect to OBJC and shared certain privileged conversations with them, which were within the scope of the attorney-client relationship and to assist the defendants in their representation of the plaintiff.

A dispute arose between Nesenoff and ENJC in January **2001**, that was similar in nature to Nesenoff’s dispute with OBJC. During negotiations to resolve this dispute, Nesenoff learned that the defendants had been retained by ENJC to represent them. The plaintiff thereupon notified the defendants in writing to return to him, his litigation files that were still in their possession. The plaintiff also requested that the defendants withdraw from the representation of ENJC, opining that such representation constituted a conflict of interest, based upon defendants’ prior representation of plaintiff in a substantially similar action. The defendants declined to withdraw. Plaintiff then filed a complaint against the defendants dated February **13, 2001**, with the Grievance Committee for the Tenth Judicial District. Prior to responding, defendants retained the L’Abbate law firm to represent them. Defendants gave the plaintiffs files to the L’Abbate firm, who had previously represented OBJC against Nesenoff. The plaintiffs files were then returned to him after that had been photocopied by L’Abbate.

The instant motion has been brought under the guise that the L’Abbate law firm’s continued representation of defendants in this matter is in violation of Canon **4** and Canon **9** of the Code of Professional Responsibility and several of the Disciplinary Rules set forth under those canons. The plaintiff alleges that L’Abbate has now gained an unfair advantage over the plaintiff which will be exploited at trial, based upon the obtaining, scrutinizing and reproduction of plaintiffs entire file and related documents which (a) are privileged communications of plaintiff; and (b) concern the subject matter of this action.

Canon **4** provides: “A lawyer should preserve the confidences and secrets of a client.”

DR **4-101 (22 NYCRR section 1200.19)** provides in pertinent part: “[A] lawyer shall not knowingly (1) reveal a confidence or a secret of a client; (2) use a confidence or secret of a client to the disadvantage of the client; and (3) use a confidence or secret of the client for the advantage of . . . a third person. . .”

Canon 9 provides: “A lawyer should avoid even the appearance of professional impropriety.”

Admittedly, the disqualification of counsel undermines a client’s right to counsel of his or her choice, disrupts the attorney-client relationship, delays the progress of litigation, and imposes additional costs on both parties. Nonetheless, conduct which may threaten the integrity of the judicial system and the adversarial process requires the Court to consider disqualification. Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975).

In Board of Education v. Nyquist, 590 F.2d 1241 at 1246 (2d Cir. 1979), the Court stated:

[W]ith rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney’s conflict of interests in violation of Canons 5 and 9 . . . undermines the court’s confidence in the vigor of the attorney’s representation of his client . . . or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his client an unfair advantage

Although the remedy is severe, the misconduct need not be egregious, as there need not be intent, bad faith, or even actual disclosure of confidential information. Conduct that merely suggests that one side might enjoy the disclosure of confidential information may warrant disqualification. See Hull v. Celanese Corp., 513 F.2d 568 at 572. Furthermore, “any doubt is to be resolved in favor of disqualification.” Id. At 571. See also, Narel Apparel v. American Utex, 460 NYS2d 125,128; Phoenix Electrical v. New York Telephone Company, 587 NYS2d 485, 487.

Under the instant circumstances, which have not been disputed by the defendants, the L’Abbate firm is in possession confidential and privileged information about the plaintiff, that was given to them by plaintiffs former counsel. It is possible that this information may find its way into the proceedings to the detriment of the client formally represented by the defendants. Whatever the motivations of the defendant and whether or not the possession of the subject information gives the defendants an unfair advantage at trial, the Court finds, that in the interests of preserving the integrity of the judicial process and preventing suspicion of the fairness of the proceedings, no remedy short of disqualification would be satisfactory. The very appearance of an impropriety may well serve to taint the proceedings.

“The dynamics of litigation are far too subtle, the attorney’s role in that process is far too critical, and the public’s interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer’s representation in a given case. These considerations require application of a strict

prophylactic rule to prevent any possibility however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.”

Emle Indus. Inc. v. Patentex, Inc., 478 F.2d 562 at 571.

The foregoing constitutes the Order of this Court.

Dated: June 19, 2003

DENISE F. MOLIA

HON. DENISE F. MOLIA
J. S. C.