

Decana Inc. v Contogouris

2005 NY Slip Op 30330(U)

June 20, 2005

Supreme Court, New York County

Docket Number: 604247/02

Judge: Richard B. Lowe

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

PRESENT: Loise
Justice

PART 56m

Decana Inc. Praxige

INDEX NO. 604247/02

MOTION DATE 6/9/05

MOTION SEQ. NO. 022

MOTION CAL. NO. _____

- v -

Spyro C. Contogouris

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FILED
JUN 20 2005
COUNTY CLERK
NEW YORK

Dated: 6/20/05

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

-----X

DECANA INC., PRESTIGE HOLDINGS INC.
and CHANGOLE INTERNATIONAL B.V.,

Plaintiffs,

Index No. 604247/02

-against-

SPYRO CONTOGOURIS, SCHANSON CAPITAL
MANAGEMENT LLC, NORTH FORK BANK,
NYMC CAPITAL CORP., and PETER ASHE
REALTY SERVICES, INC. (a/ka/dba PETER
ASHE REALTY and the PETER ASHE
COMPANY),

Defendants.

-----X

RICHARD B. LOWE, III, J.:

Plaintiffs move this Court for an order disqualifying Richard B. Feldman, Esq. from representing defendants Spyro C. Contogouris (“Contogouris”) and Schanson Capital Management LLC (collectively, the “Contogouris Defendants”) in this action.

Background

Plaintiff Decana Inc.’s (Decana) principal asset is an apartment building located at 10 East 62nd Street. Decana is a wholly owned subsidiary of Prestige Holdings, Inc. (Prestige). Both are in turn owned by Changole International B.V. This instant action is brought seeking declaratory judgment that a mortgage placed upon the property by its former officer Contogouris is void. The action also seeks return by Contogouris of the 3.6 million received. Plaintiffs allege that Contogouris acted outside the scope of his authority when mortgaging the property and that he misappropriated the funds. Plaintiffs also allege other malfeasance by Contogouris

during his management of the companies.

On March 22, 2005, the attorney for the Contogouris Defendants, Daniel B. Faizakoff, Esq., filed an order to show cause to be relieved as counsel. The application was granted and said defendants were given thirty days to retain a new attorney. Thirty days after the hearing, on April 23, 2005, upon learning Feldman was retained to represent the Contogouris defendants, Plaintiffs immediately raised an issue as to a possible conflict because Feldman had previously represented Plaintiffs Decana and Prestige in other similar actions pending before this Court.¹ (Affirmation of John G. Kissane, June 2, 2005). On or about April 27, 2005, Plaintiffs' counsel sent a facsimile to Feldman indicating his intent not to waive any conflict. (See Exhibit 1, Affirmation of John Kissane, June 2, 2005).

On May 10, 2005, Feldman was substituted as counsel by the Contogouris defendants in this instant action as well as the following actions: Nicolaos Stavrou, Decana Inc., Prestige Holdings, Inc. V. Spyro C. Contogouris et al, Index No. 108965/02 (the "Article 78 Proceeding"); Spyro C. Contogouris and Schanson Capital Management LLC v. Vassilios Manios, Joanne Korbakis and Decana Inc.,, Index No. 602285/04. Plaintiff then brought this instant order to show cause seeking disqualification of Feldman because of his prior representation of Decana and Prestige in other related actions.

Feldman's representation of Decana and Prestige began when he filed an Answer dated April 9, 2002 in the action titled Christos S. Contogouris v. Evangelia Zachariou, et al, Index No.

¹Those actions include: Nicolaos Stavrou, Decana Inc., Prestige Holdings, Inc. V. Spyro C. Contogouris et al, Index No. 108965/02 (the "Article 78 Proceeding"); Christos S. Contogouris v. Evangelia Zachariou, et al, Index No. 600850/02 (the "Christos Contogouris Actions")

600850/02 (the "Christos Contogouris Action"). In the Christos Contogouris Action, Christos Contogouris represented that he had an oral contract with one of the beneficial owners of Decana and Prestige. The alleged oral agreement promised him approximately 5% of the assets of Decana and Prestige. (See Complaint, Exhibit 5, Affirmation of John Kissane, June 2, 2005). Christos Contogouris is the father of Contogouris, Defendant herein. The issues raised by Christos Contogouris in the complaint include allegations that Plaintiffs herein, Decana and Changolc, were created to avoid taxes, that the beneficial owners of Decana and Prestige avoided payment of taxes, and allegations concerning a dispute between the beneficial owners, Evangelia Zachariou and Vassilios Manios. These issues appear to be similar to those raised by Contogouris as defenses to this action. Feldman was appointed to represent Decana and Prestige by Contogouris, who was then in control of the corporations.

Because the shareholders of Decana and Prestige did not want Contogouris, who was suspected of diverting funds of Prestige to himself, appointing the attorney who would defend an action brought by Christos Contogouris, Contogouris was asked to resign any posts held in Decana and Prestige and to have Feldman withdraw his answer (Affirmation of John Kissane, June 2, 2005). After his refusal to resign, on May 6, 2002, the Article 78 Proceeding was brought to remove Contogouris and to prevent Feldman from acting on behalf of Decana and Prestige.

Feldman appeared as counsel for Decana and Prestige at three hearings in the Article 78 Proceeding. Feldman also made an application to the Court asking for a TRO issued in the matter to be amended to allow the companies to pay expenses (Exhibit 8, Affirmation of John Kissane, June 2, 2005). Feldman and counsel for the movants in the Article 78, John Kissane,

Esq., negotiated a Stipulation, dated June 7, 2002, whereby Feldman would provide Kissane with invoices of Decana and request the new management's approval to pay invoices. Kissane affirms that during this time Feldman maintained he was representing Decana and Prestige, not Contogouris who had retained separate counsel, Kilhenny & Felix (Affirmation of John Kissane, June 2, 2205). On September 17, 2002, this Court filed a Decision and Judgment removing Contogouris from his positions with Decana and Prestige as of April 5, 2002. In the decision, Contogouris and the acting attorneys for Decana, including Feldman, were ordered to turn over to Nicolaos Stavrou all books, records, and property of Decana. Movants herein allege Feldman turned over some, but not all, documents.

Movants allege that of the documents Feldman did turn over, it became apparent that Contogouris was making payments from the funds of Decana that were not approved by the new management as required by the Stipulation resolving the TRO. An Order to Show Cause seeking to hold Contogouris in contempt was filed on September 17, 2002 alleging that he spent money of Decana without obtaining the approval required by the Stipulation. In an affidavit submitted in opposition to their motion, Feldman affirmed, "I am one of the attorneys for Decana, Inc. and am fully familiar with all the facts and circumstances set forth herein." Mr. Feldman stated that as the attorney for Decana he "endeavored to apprise [Petitioner's counsel] of operational events affecting the [Decana] Property" (Exhibit 10, Affirmation of John Kissane, June 2, 2005). He also stated that he believed there were no violations of the so ordered stipulation, or if there were, they were de minimus. At the contempt hearing, Feldman also stated:

while I served as Decana's counsel during the pendency of the motion for removal of Mr. Contogouris, I cooperated with Mr. Kissane when he made a letter request for a

number of documents I had them transmitted to me from Mr. Serwin and gave the box to Mr. Kissane.

He recently written me a letter saying he's missing half a dozen or so invoices. I have offered to come over even this afternoon to help him find them in that box. He told me that he has the original box . . . My offer is still available to do that, even though I no longer represent Decana, and Mr. Contogouris is represented by capable Counsel (Transcript, November 21, 2002, at page 19-20).

There is currently pending before this Court another contempt motion for violation of the same TRO, for the same period of time in which Feldman was representing Decana.

Approximately six months after Contogouris had been removed and directed to turn over all documents of Decana and Prestige, Feldman forwarded two documents allegedly misfiled by his paralegals. (Affirmation of John Kissane, June 2, 2205). The first item was a checkbook for an account of Decana at North Fork Bank. This account was opened in conjunction with the loan and mortgage executed by Contogouris over Decana's property, which is the subject of this instant action. The beneficial owners and new management allegedly had no knowledge of this mortgage until Contogouris was removed and the documents were ordered to be turned over.

Allegedly, to date, Feldman has not turned over all documents related to his representation of Decana and Prestige. At a May 9, 2002 hearing before this Court, he referenced a retainer letter which movants allege has not been turned over despite the order of this Court. Nor have billing statements or time reports been turned over.

Despite his statement on the record of November 21, 2002, Feldman argues that he at no time represented Decana and Prestige in the Article 78 proceeding and all appearances made on behalf of Decana and Prestige were made in the Christos Contogouris action. He states that

because the issues in the Christos Contogouris action are not related to the issues in the instant action, this application must be denied.

Discussion

DR 5-108 states:

- 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.

Thus, a party seeking to disqualify an attorney or law firm, must establish (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, Tckni-Plex v. Meyner & Landis, 89 N.Y.2d 123; Solow v. Grace & Co., 83 N.Y.2d 303. There is an irrefutable presumption of disqualification once all three criteria have been met.

Prior Attorney-client Relationship

Here, there is no question that an attorney-client relationship existed between Feldman, Decana, and Prestige. In the Christos Contogouris Action, he filed an Answer on behalf of Decana and Prestige. Feldman does not dispute this assertion. However, he does refute movants argument that he represented the corporations in the Article 78 Proceeding.

It appears clear that Feldman did represent Decana and Prestige in the Article 78 Proceeding, despite his failure to produce a retainer agreement as to his representation in any of the actions. On September 20, 2002, Feldman signed a sworn affidavit submitted in the Article

78 Proceeding whereby he affirmed: "I am one of the attorneys for Decana, Inc." He then went on in the affidavit to argue in opposition for the removal of Contogouris. Furthermore, on May 15, 2002, Feldman submitted a letter to this Court which referenced the Article 78 Proceeding where he again holds himself out to the Court as counsel for Decana and Prestige. In the letter, he states:

As counsel for Decana Inc. and Prestige Holdings, Inc.
* * * [we] feel compelled to request a clarification or
modification of the temporary restraining order contained
within the Order to Show Cause dated May 6, 2002

Lastly, the transcripts from the Court appearances on the Article 78 Proceeding all list Feldman as counsel for Decana and Prestige. Nowhere is it distinguished that his appearance is being made on behalf on the corporations with respect to the Christos Contogouris Action, but not the Article 78 proceeding. In fact, it appears to this Court that only in hind sight does Feldman attempt to distinguish which actions he represented Decana and Prestige.

Substantially Related Matters and Adverse Interests

This Court recognizes that disqualification motions are often used for tactical purposes and where the movant has failed to demonstrate a conflict of interest, a party's right to representation by an attorney of its choice should not be interfered with. S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437 (19087); Board of Educ. Of City of New York v. Nyquist, 590 f2d 1241, 1246 (2d Cir. 1979). However, the first client is entitled to freedom from apprehension and certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney. Cardinale v. Golinello, 43 N.Y.2d 288, 295-96, 401 N.Y.S.2d 191 (1977). Therefore, if there is a reasonable probability of

disclosure of confidential information obtained as a result of the prior action, an attorney may be disqualified. NYK Line (North America) Inc. V. Mitsubishi Bank, Ltd., 171 A.D.2d 486, 488 (1st Dept 1991); Will of Mann, 111 A.D.2d 652 (1st Dept 1985).

In the Article 78 Proceedings, Feldman presented argument to this Court which showed that he is intimately familiar with structure and background of Decana and Prestige (Exhibit 4, Affirmation of John Kissane, June 2, 2005). Furthermore, Contogouris's alleged mishandling of Decana and Prestige were the very issues in the Article 78 and served as the grounds for his removal. Feldman represented Decana and Prestige in a contempt hearing for an alleged violation of the TRO where Contogouris's alleged diversion of IRS checks were at issue. There is presently another contempt motion in that action pending. It is Contogouris's mishandling of the corporations which is the subject of this present action. This action seeks to hold Contogouris liable for misdirected funds and malfeasance; including an unauthorized mortgage placed on Decana's property by Contogouris. These issues are clearly substantially related to Feldman's representation of Decana and Prestige in the Article 78. Therefore he must be barred from representing Contogouris in this action.

Feldman also represented Decana and Prestige in the Christos Contogouris action. He filed an Answer on behalf of Decana and Prestige in the action. The allegations in the Complaint of Christos Contogouris involve many of the same issues as this action. For example, Christos Contogouris set forth the whole background of the Corporations' ownership, including the allegation that Plaintiffs herein, Decana and Changole, were expressly created for the purpose of avoiding Greek taxes and/or other taxes. (Exhibit 5, Affirmation of John Kissane, June 2, 2005 Complaint at ¶ 31 and 38). It appears that Contogouris will use this same argument in the instant

action against Changole and the beneficial owner, third-party defendant Vassilios Manios. (Exhibit 7 - Excerpts from the deposition transcript of Secretary of Decana Joanne Korbakis, pages 188-197; 835-838). Feldman, cannot, in one matter, defend Decana against these allegations, yet in another, use the same allegations as a defense for his second client.

Feldman has failed to establish to this Court that any information acquired by [him], in the prior litigations is unlikely to be significant or material in the [current] litigation. Kassis v. Teachers Insurance and Annuity Association, 93 N.Y.2d 611, 617, 717 N.E.2d 674, 678, 695 N.Y.S.2d 515, 519 (1999). His prior representation of Decana and Prestige have made him intimately acquainted with the structure of the corporations, and as such he must be barred from defending against them in the present action. Accordingly, the motion to disqualify is granted.

ORDERED that a copy of this order with notice of entry by served upon defendants Contogouris and Schanson at their last known address by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by regular mail; and it is further

ORDERED that Contogouris and Schanson shall retain new counsel within 30 days of entry of this order.

This shall constitute the Order and Decision of the Court.

Dated: June 20, 2005

FILED
JUN 20 2005
COUNTY CLERK'S OFFICE
NEW YORK
HON. RICHARD B. LOWE, III
J.S.C.