[*1] FILED ON 3/26/2007

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

PRESENT: HON. ROLANDO T. ACOSTA PART 61

Index Number : 601137/2006

HOTEL ELK

vs

EXTELL DEVELOPMENT

Sequence Number : 001

SUBST/RELIEVE/WITHDRAW COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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	See attached
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
MAR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED

Dated: 3/12/07

J.S.C.
ROLANDO T. ACOSTA

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Hotel Elk, Inc.,

Plaintiff,

– against –

Extel Development Company, Extel Rock LLC, 578 Ninth Avenue Associates, LLC and Bovis Lend Lease LMB, Inc.,

Defendants.

DECISION/ORDER

Index No. 108103/06

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant 578 Ninth Avenue Associates, LLC ("578") motion to disqualify plaintiff's counsel from representing plaintiff on the basis of a conflict of interest:

Papers	**Numbered**
Notice of Motion, Affidavit & Affirmation	**1 (Exhibits A-D)**
Extel Rock's Affirmation in Support	**2 (Exhibits A-B)**
Affirmation in Opposition	**3 (Exhibit A)**
Reply Affidavit	**4**

Defendant 578 Ninth Avenue Associates LLC ("578") is the owner of 360 West 42nd Street in New York County, the subject premises, and plaintiff Hotel Elk, Inc, is the net lessee of the residential hotel located at the subject premises. In the instant action, plaintiff alleges that an adjacent building and its contractor damaged the premises' roof, which caused flooding. According to plaintiff, it named 578 as a necessary party, but it seeks no relief from 578.

Approximately one year prior to the commencement of the instant action, plaintiff's counsel (the law firm of Goldberg, Scudieri, Lindenberg & Block, P.C., "Goldberg Scudieri") represented both plaintiff and 578 in a matter with the Department of Buildings

("DOB"). During the course of Goldberg Scudieri and 578's attorney client relationship, 578 [through Martin Sanders] "spoke frequently and freely with members of the Goldberg Scudieri law firm about [Sanders'] financial viability in the event that extensive repairs were required. [Sanders] openly discussed what [his] insurance policy would and would not cover in the event a defective condition was found to exist." Sanders Affidavit at ¶ 6. Accordingly, 578 moved to disqualify Goldberg Scudieri from representing plaintiff on the basis of an impermissible conflict of interest.

Defendant Extel Rock LLC ("Extel"), the owners of the condominium development under construction, supports the motion, noting that it has served a cross-claim against 578 seeking indemnification and contribution. It also noted that the action revolves around the condition of the building and at this time before any discovery is completed it may be just as likely the alleged leaks plaintiffs are alleging were caused by a failure to maintain the building as opposed to any action defendant Extel took with regard to the neighboring premises. Affirmation in Support at ¶ 3. Extel also noted that 578 "conceded in their papers that there were problem relating to the maintenance of the building. . . . It may be that different counsel, who did not have a relationship with [578], might seek monetary relief from [578] which would be in [Extel's] interest" Affirmation in Support at ¶ 4. Thus, according to Extel, "plaintiff's counsel should be disqualified from representing [plaintiff] based upon the prior representation of [578] concerning matters relating to the maintenance of the building, because even if there is no proof yet, that those prior matters are related to this claim, there clearly is the appearance of impropriety." Affirmation in Support at ¶ 5.

DR 5-108 (a) [Disciplinary Rules of the Code of Professional Responsibility] provides that "a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) [t]hereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client; and (2) use any confidences or secrets of the former client except as permitted by [DR 4-101(c)] . . . or when the confidence or secret has become generally known." DR 4-101 in turn defines a confidence as information protected under the attorney-client privilege, and secret as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Moreover DR 4-101(b)(1) & (2) state that a lawyer is not permitted to reveal a confidence or secret of a client or use a confidence or secret of a client to the disadvantage of the client.

In order to disqualify an attorney on conflict of interest grounds, the moving party must not only establish the existence of the prior attorney-client relationship, but must also show that "the former and current representations are both adverse and substantially related."

Solow v. W.R. Grace & Co., 83 N.Y.2d 303 (1994). In order to meet the substantial relationship test, the issues in the present action must be "identical" or "essentially the same" as those in the prior case. Lightning Park, Inc. v. Wise Lerman & Katz, 197 A.D.2d 54 (1st Dept. 1994). Conclusory allegations are inadequate to warrant attorney disqualification. See Andre v. City of New York, 19 A.D.3d 340 (1st Dept. 2005); see also Jamaica Public Service Co. Ltd. v. AIU Ins. Co., 92 N.Y.2d 631 (1998) ("While a movant need not actually spell out the claimed secrets and confidences in order to prevail, it must at a minimum provide the motion court with information sufficient to determine whether there exists a reasonable probability that DR 5-108[] would be violated.").

The Court recognizes that the importance of preserving client confidences and secrets requires that all doubts be resolved in favor of attorney disqualification. The Court, however, is also cognizant of both that disqualification interferes with a party's right to retain counsel of his choice, and, in the current reality of litigation, disqualification motions are often utilized as a tactical tool. First Hudson Financial Group v Martinos, 11 Misc. 3d 394, 396 (Sup. Ct, NY Co. 2005). Therefore, motions to disqualify an attorney are subject to a high burden of proof. Id. at 397; see also Hickman v. Burlington Bio-Medical Corporation, 371 F. Supp.2d 225 (E.D.N.Y. 2005). Moreover, the appearance of impropriety, without more, is insufficient to grant a motion to disqualify. In re Stephanie X, 6 A.D.3d 778 (3rd Dept. 2004); United States Football League v. National Football League, 605 F. Supp. 1448 (S.D.N.Y. 1985); First Hudson Financial Group v Martinos, 11 Misc. 3d at 397.

This Court specifically raised these concerns in First Hudson Financial Group v Martinos, 11 Misc. 3d 394 (Sup. Ct, NY Co. 2005), where a brokerage firm employee filed an arbitration claim against the brokerage firm for commissions and to recover on promissory notes. The firm sought to disqualify the employee's attorney because the attorney had previously provided the firm with an advisory opinion regarding issuing stock to one of its principals. This Court did not find a conflict of interest because the advisory opinion was neither substantially related to the employee's assertions, nor would counsel's representation of the employee have an adverse impact on whether the firm owed the employee commissions. See also Connolly v. Napoli, Kaiser & Bern, 12 Misc. 3d 530 (Sup. Ct, NY Co. 2006)(plaintiff failed in its burden to establish that disqualification was warranted).

Applying these precepts to the facts of this case, there exist a reasonable probability that DR 5-108 will be violated. Although the prior matter between the DOB, plaintiff and 578 primarily dealt with issues of egress and ingress, the issue in this case is "substantially related" nonetheless inasmuch as issues of insurance coverage and 578's financial viability in the event that extensive repairs were required were openly discussed, as well as the extent

of 578's insurance policy's coverage in the event a defective condition was found to exist. These issue are substantially related to plaintiff's claim against Extel and the other defendants in the event that any damage to the roof was as a result of 578's failure to maintain the roof. Moreover, Extel cross-claimed against 578 for indemnification and contribution, which necessarily implicates 578's insurance coverage. Accordingly, the claim is adverse to 578 as well notwithstanding that plaintiff is seeking no damages against 578 at this juncture.

Accordingly, based on the foregoing, it is hereby

ORDERED that 578's motion to disqualify plaintiff's law firm is granted.

This constitutes the Decision and Order of the Court.

Dated: March 12, 2007

ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

FILED
MAR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE