Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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GEMINI COMPUTERS, INC.,

Index No: 17319/06
Motion Date: 1/24/07
Motion Cal. No: 15

Plaintiff,

-against-

POS COMPUTERS USA, INC., and
EDWARD BABEKOV,

Defendants.

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The following papers numbered 1 to 10 read on this motion by defendants for an order, pursuant to 22 NYCRR §1200.7, disqualifying Ostrolenk, Faber, Gerb & Soffen from representing defendants Pos Computers Usa, Inc. and Edward Babekov.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum.....	1 - 6
Affirmation in Opposition.....	7 - 8
Reply.....	9 - 10

Upon the foregoing papers, it is ordered that the motion is resolved as follows:

This is an action for injuries allegedly sustained by plaintiff Gemini Computers, Inc. ("Gemini") as the result of the alleged theft of Gemini trade secrets and the formation of a competing business in violation of the employment agreement between defendant Edward Babekov ("Babekov") and Gemini, for whom he worked from April 2005, until November 2005. Allegedly during this period, Babekov founded defendant POS Computers USA, Inc. ("POS"), a corporation organized under the laws of the State of New York, and is a shareholder, officer, and director of defendant. Defendants are currently represented by Ostrolenk, Faber, Gerb & Soffen, LLP ("OFGS"), a firm that previously represented Gemini in another matter. Consequently, Gemini moves to disqualify OFGS, pursuant to 22 N.Y.C.R.R. § 1200.27, which, in pertinent part, provides:

Section 1200.27 [DR 5-108] Conflict of interest; former client.

(a) Except as provided in section 1200.45(b) of this Part with respect to current or former government lawyers, a lawyer who has represented a

> client in a matter shall not, without the consent of the former client after full disclosure:
>
> > (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.

In Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611, 615-16 (1999) [citing Cardinale v Golinello, 43 N.Y.2d 288, 295-296 (1977)], the Court of Appeals set forth the rationale underlying this rule:

> Attorneys owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship. It is this duty that provides the foundation for the well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter.

Notwithstanding, the disqualification of an attorney is a matter that rests within the sound discretion of the court. Aryeh v. Aryeh, 14 A.D.3d 634 (2005); Horn v. Municipal Information Services., 282 A.D.2d 712 (2001). As a general rule, a court is loathed to abridge a party's valued right to be represented in ongoing litigation by counsel of the party's own choosing "absent a clear showing that disqualification is warranted." Id., citing, Olmoz v. Town of Fishkill, 258 A.D.2d 447 (1999); Feeley v. Midas Props., 199 A.D.2d 238 (1993).

The burden thus is on the party moving for disqualification under Code of Professional Responsibility DR 5-108 (22 NYCRR 1200.27) to prove the "(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, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131 (1996) [citing Solow v. Grace & Co., 83 N.Y.2d 303, 308 (1994)]; see, also, Calandriello v. Calandriello, 32 A.D.3d 450 (2d Dept .2006); Medical Capital Corp. v. MRI Global Imaging, Inc.; 27 A.D.3d 427, (2d Dept.2006). Proving these three elements gives rise to an irrebuttable presumption of disqualification. Id., 89 N.Y.2d at 131.

Here, Gemini has met its burden. It is clear from the record that there exists a prior attorney-client relationship between Gemini and OFGS, and that the interests of Gemini and defendants are materially adverse. It is also clear that the matters involved in the instant case and the prior representation of the Gemini by OFGS are substantially related. Matters are substantially related if central issues are common to both cases and the witnesses, evidence, and testimony are likely to be similar in each action. Pastor v. Trans World Airlines, Inc., 951 F. Supp. 27, 31 (E.D.N.Y 1996). A review of the record reveals that OFGS acknowledges representing Gemini in a matter involving patent infringement. Such an action is substantially related to the instant action as it involves the alleged use of trade secrets and software codes by defendants. Such evidence would have also been involved in the previous representation, and

notwithstanding contentions to the contrary, it is of no moment whether or not OFGS actually obtained any confidential information in connection with the patent infringement action. See Cardinale, 43 N.Y.2d at 295.

Accordingly, the motion to disqualify OFGS pursuant to 22 N.Y.C.R.R. § 1200.27 is granted. Defendants are granted forty- five (45) days after service of the within order upon them in which to obtain new counsel, during which time all proceedings are hereby stayed. Gemini hereby is directed to serve a copy of this order with notice of entry upon defendants and the stay shall be lifted forty-five days therefrom. The aforementioned stay shall have no impact on the settlement agreement regarding the posting of an undertaking, entered into by the parties on the record before this Court on March 27, 2007, and Gemini is directed to post a bond in accordance with such agreement.

Dated: April 27, 2007

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J.S.C.