

Andrew Garrett, Inc. v Bishop, Rosen & Co.
2007 NY Slip Op 31232(U)
May 7, 2007
Supreme Court, New York County
Docket Number: 0113630/2006
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 113630/2006

ANDREW GARRETT, INC.

vs

BISHOP, ROSEN & CO.

Sequence Number : 002

DISQUALIFY COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

T _____ motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

and cross motion

Upon the foregoing papers, it is ordered that this motion *be decided per*

attached

FILED
MAY 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/7/07

EMILY JANE GOODMAN

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: IAS PART 17

-----X

ANDREW GARRETT, INC.,

Petitioner,

v.

Index. No. 113630/06

BISHOP, ROSEN & CO., ROBERT ROSEN,
ALAN UNDERBERG, ERNEST SILANO and
VINCENT FICCI

Respondents.

-----X

GOODMAN, EMILY JANE, J.S.C.

Vincent Ficci (“Ficci”) and Ernest Silano (“Silano”) move to disqualify petitioner’s counsel Barry M. Bordetsky (“Bordetsky”) from representing petitioner Andrew Garrett, Inc. (“AGI”) in an arbitration pending before the National Association of Securities Dealers, Inc. (“NASD”). At issue in that arbitration is whether Ficci and Silano, former AGI employees, misappropriated or improperly used AGI’s confidential information or trade secrets in violation of their employment agreements, and whether they unlawfully solicited AGI employees or customers.

AGI cross moves for an order holding respondents Bishop, Rosen & Co. (“Bishop Rosen”) and Silano and Ficci in contempt of this court’s September 22, 2006 temporary restraining order.

BACKGROUND

Respondent stockbrokers, Ficci and Silano, are former employees of AGI, an investment banking, securities and asset management firm. According to the petition, both Ficci and Silano

signed employment agreements in favor of AGI that prohibited them from disclosing AGI's client and proprietary information to any third party without AGI's consent. Silano's employment agreement states that its confidentiality provisions shall remain in effect for one year after the termination of Silano's employment. Silano also signed a Nonsolicitation and Unfair Competition agreement ("the Nonsolicitation Agreement") in favor of AGI in which he again agreed not to disclose AGI's client, confidential or trade secret information or to solicit AGI employees for a competitor.

AGI terminated Ficci's employment on August 31, 2006 and Silano resigned on September 20, 2006. Both brokers are now working for Bishop, Rosen.

In the petition, and in the statement of claim in support of arbitration, AGI alleges that Ficci and Silano violated their employment agreements and that Silano violated his Nonsolicitation Agreement by soliciting AGI's brokers and clients for Bishop, Rosen and by disclosing AGI's proprietary and confidential information for the benefit of Bishop, Rosen (Siegel Aff, Exs. 1 & 2). In connection with its Order to Show Cause, dated September 22, 2006, Petitioner sought a temporary restraining order, in aid of arbitration. The court issued a temporary restraining order on that date. AGI commenced the NASD arbitration on September 27, 2006 and pursuant to an October 10, 2006 stipulation, the parties agreed to continue the relief granted in the temporary restraining order until the arbitrators issue a decision in the NASD arbitration (Siegel Aff. Ex. 3).

Disqualification Motion

Ficci and Silano seek to disqualify Bordetsky on the ground that Bordetsky represented them in prior NASD proceedings while they were petitioner's employees. They claim that

disqualification is necessary because the issues in the prior arbitrations were substantially related to the current arbitration and that, as a result of that prior representation, Bordetsky learned confidences and secrets that he may now use against them in the present arbitration. Specifically they state, in conclusory fashion, that the prior arbitrations and the pending arbitration relate to their employment at AGI, the termination thereof, and their current employment at Bishop Rosen (Ficci Aff. ¶5, Ex. 4; Silano Aff., ¶6, Ex. 4).

A. Ficci

Bordetsky represented both AGI and Ficci in an arbitration commenced in March, 2006 (“Burton Arbitration”) in which Burton, a former AGI customer, claimed breach of the NASD rules relating to suitability of investments, breach of fiduciary duty, failure to supervise, excessive trading, negligence and violation of various Illinois securities laws.

As a condition of Bordetsky’s representation of Ficci in the Burton arbitration, Ficci executed a retainer agreement and a waiver letter regarding potential conflicts with AGI. The waiver letter states in pertinent part:

You hereby understand and acknowledge that Andrew Garrett may have provided legal representation on your behalf in the past and will continue to provide legal representation to you in your capacity as registered representative in this matter. This representation will immediately cease upon the termination of your employment with Andrew Garrett. You hereby expressly acknowledge the representation and hereby expressly waive any conflict that arises (or may arise) based upon such representation. In the future you will inform us (and we shall do the same for you) of any additional conflicts (or potential conflicts) that may arise based upon the above. Moreover, if a conflict should arise, as indicated above, in any matters known now, or which arise in the future, you agree not to object to our continuing to act as counsel for Andrew Garrett in any such matters.

(Bordetsky Aff., Ex. 1). Bordetsky's representation of Ficci terminated upon the settlement of the Burton arbitration in July, 2006.

B. Silano

In August, 2006 Silano asked Bordetsky to represent him in an NASD on-the-record (OTR) interview scheduled for September 14, 2006 regarding allegedly questionable trading that occurred in two customer accounts. Silano executed a retainer agreement and a waiver letter substantially similar to the retainer and waiver signed by Ficci. The OTR was thereafter rescheduled to a date in October, but, on September 20, 2006, Silano resigned from AGI and, pursuant to the terms of the retainer letter, Bordetsky's representation of Silano ended on the date of Silano's resignation.

DISQUALIFICATION

In support of the motion to disqualify Bordetsky, respondents argue that disqualification is mandated by the Code of Professional Responsibility (DR) 5-108 (A)(1) because: 1) Bordetsky is representing AGI in the current arbitration; 2) AGI's interests in the current arbitration are adverse to his former clients, Ficci and Silano and 3) the issues in the current arbitration are substantially related to Bordetsky's prior representation of Ficci and Silano. Respondents also claim that Bordetsky will undoubtedly use confidences and secrets he learned about Ficci during the Burton arbitration in violation of the Code of Professional Responsibility DR 5-108(A)(2).

In opposition to disqualification, AGI argues that Ficci's prior arbitration and Silano's OTR interview involved customer trading issues that have absolutely nothing to do with the claims asserted against Ficci and Silano in the current arbitration. Bordetsky also contends that Ficci's claim that Bordetsky will misuse confidential and privileged information is conclusory

and speculative since Ficci does not identify the confidential and/or privileged information or ask for an *in camera* inspection of such information. Finally, AGI claims that by executing the waiver agreements, Ficci and Silano waived their objections to Bordetsky's representation of AGI in a subsequent matter adverse to their interests.

DISCUSSION

Under DR 5-108¹, an attorney who has formerly represented a party shall not then represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client (Code of Professional Responsibility DR 5-108[A][1]). In addition, an attorney may not 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. Code of Professional Responsibility DR 5-108[A][2]); Jamaica Pub. Serv. Co. Ltd. v. AUI Ins. Co., 92 N.Y.2d 631 (1998).

A party seeking disqualification must prove that there was an attorney client relationship; that the matters involved in both representations are substantially related and that the interests of the parties are materially adverse. Id. The burden of showing the existence of a conflict of

¹ DR 5-108, entitled "Conflict of Interest - Former Client" provides as follows:

- A. . . .[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.
 2. Use any confidences or secrets of the former client except as permitted by DR 4-101 (1200.19)[C] or when the confidence or secret has become generally known.

interest lies with the movant. Application of the Metropolitan Transportation Authority, 222 A.D.2d 340 (1st Dept 1995); quoting Solow v. W.R. Grace & Co., 83 N.Y.2d 303 (1994). The requirements are conjunctive, not disjunctive, and if a movant is unable to meet its burden of proof for all three elements, the motion for disqualification must be denied. Jamaica Pub. Serv. Co. Ltd. v. AUI Inc. Co., 92 N.Y.2d at 631. Conclusory assertions of conflict are insufficient to warrant disqualification. Snow Becker & Krause, P.C. v. ISG Solid Capital Markets, LLC., 298 A.D.2d 210 (1st Dept 2002).

Respondents have failed to establish that disqualification is warranted because they have not shown that Bordetsky's prior representation of Ficci in the Burton arbitration, nor Silano in the OTR was in anyway related to the pending arbitration. Those two prior matters involved customer trading issues (1/29/07 Bordetsky letter, Exs. A, B and C). The current arbitration alleges that Ficci and Silano breached their employment agreements by misappropriating or improperly using AGI's confidential information or trade secrets and further claims that they unlawfully solicited AGI's customers and employees. Respondents' unsupported assertions that there is a relationship between these matters is inadequate to warrant attorney disqualification. Moreover, their conclusory assertion that confidences and secrets will be revealed is also insufficient to warrant disqualification. A party seeking disqualification based on disclosure of confidential information previously made to the attorney "has the burden of identifying the specific confidential information imparted to the attorney." Muriel Siebert & Co. v Intwit Inc., 2006 NY Slip Op 6252 (1st Dept 2006) (internal citation and quotations omitted); see also Schneider v. Saiber Schlesinger Satz & Goldstein, LLC, 260 A.D.2d 321 (1st Dept 1999) ("disqualification should be denied for failure to show nature and substance of the confidential

information plaintiff imparted to attorneys, and its bearing on the arbitration proceeding”).

Because the court finds that disqualification is not warranted under the Code of Professional Responsibility, based on movants failure to demonstrate that the prior representation is substantially related to the current arbitration or that it is likely that confidences and secrets will be revealed, the court need not address the issue of waiver pursuant to the retainer agreements.

CROSS MOTION FOR CONTEMPT

AGI contends that respondents violated the temporary restraining order issued on September 22, 2006 because Ficci and Silano subsequently contacted three AGI employees and told them about the benefits of working at Bishop, Rosen. Petitioner relies on the affidavits of three current AGI employees, Randy Langhamer (“Langhamer”), Jaime Mercado (“Mercado”) and Arthur Young (“Young”), each of whom aver that Ficci and/or Silano called them and told them how much they were enjoying their new jobs at Bishop, Rosen². Langhamer, Mercado and Young each stated that, “I got the distinct impression that [Ficci and/or Silano] was selling me on the benefits of Bishop Rosen.”

In opposition, Ficci and Silano deny soliciting AGI employees. They further maintain that the restraining order (the relevant provision of which was drafted by AGI) did not prohibit them from speaking to AGI employees, nor did it prevent them from soliciting those employees as long as they did not use AGI documents or information to aid in the solicitation.

In determining contempt issues, courts construe “a judgment or order strictly and resolve

² Langhamer, Mercado and Young affidavits are attached to the back of Exhibit 5 of the 11/2/06 Bordetsky affidavit.

any ambiguity in favor of the contemnor.” See Benson Realty Corp. v. Walsh, 54 A.D. 881 (1st Dept 1976). Here, even assuming the truth of AGI’s allegations, Ficci’s and Silano’s actions did not violate the terms of the court’s September 22, 2006 temporary restraining order. The temporary restraining order provides, in relevant part, that:

AND IT IS FURTHER ORDERED that, for the purpose of soliciting Andrew Garrett customers or employees, pending the hearing of this motion, Respondents are enjoined from using, disclosing or transmitting information including all books, records, documents and information pertaining to Andrew Garrett’s business activities, including, but not limited to customers, customer accounts, prospective customers, customer leads and referrals therefrom, and the names, addresses or other information related to said customers’ accounts, prospects and referrals other than customers, prospective customers, accounts, referrals which the Brokers obtained through social or family or business contacts unrelated to Garrett

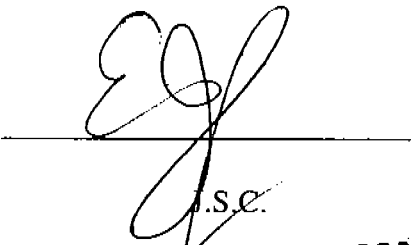
The Court cannot read this poorly drafted language (which was drafted by AGI) as restraining respondents from “solicitation” (which is not defined in the Order) because that term is tied to, and modified by, language enjoining respondents from disclosing AGI information. Therefore, the issue of whether Ficci’s and Silano’s behavior rose to the level of solicitation in violation of their agreements with AGI is not an issue to be decided by this court. Rather, it is one of the central issues to be decided in the arbitration.

Accordingly, it is ORDERED that Ficci and Silano’s disqualification motion is denied and the arbitration shall continue; and it is further

ORDERED that AGI's cross motion for contempt is denied.

This constitutes the Decision and Order of the Court.

DATED: May 7, 2007


i.s.e.
EMILY JANE GOODMAN

FILED
MAY 15 2007
COUNTY CLERK'S OFFICE
NEW YORK