

<b>Giovanni-Inoue v De La Rosa</b>
2007 NY Slip Op 32151(U)
July 11, 2007
Supreme Court, New York County
Docket Number: 0109716/2006
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: SHULMAN  
Justice

PART 1

GIOVANNI-INOUE, RAEANNE

INDEX NO. 109716/06

- v -

EZEQUIAL DE LA ROSA,  
ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3, 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
JUL 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 11, 2007

MARTIN SHULMAN  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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 1

-----X  
RAEANNE GIOVANNI-INOUE,

Index No: 109716/06

Plaintiff,

-against-

**Decision and Order**

EZEQUIEL De La ROSA and JAMES KNEHANS,

Defendants.

**FILED**  
JUL 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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**Hon. Martin Shulman, J.S.C.:**

Plaintiff, Raeanne Giovanni-Inoue ("Giovanni" or "Plaintiff") has moved *inter alia* for summary judgment against co-defendant, James Knehans ("Knehans") on her first cause of action for ejection. Prior to this summary judgment motion becoming *sub judice*, plaintiff's counsel moved by order to show cause ("OSC" or "Disqualification Motion") to disqualify Joseph Burden, Esq. ("Burden"), a member of the law firm of Belkin, Burden, Wenig & Goldman, L.L.P. (the "Belkin Firm"), and the Belkin Firm from any continued representation of Knehans after their recent retention during the pendency of this round of motion practice.

**Brief Factual Background and Procedural History**

In or about 1990, Giovanni together with a former co-tenant, Tony Cenicola, commenced occupancy of the entire 11<sup>th</sup> floor (the "11<sup>th</sup> Floor Loft") located at 325 West 37<sup>th</sup> Street, New York, New York 10018 (the "Building").<sup>1</sup> Thereafter, they executed a

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<sup>1</sup> This and other undisputed factual information, together with the procedural history of this action, was garnered from the Giovanni Affidavit in support of her motion for summary judgment as well as her summons and complaint (Exhibit A to Motion) and Knehans' pro se answer (Exhibit C to Motion).

series of renewal leases with the owner, 37 West Realty Company (the "Owner"), the most recent of which was for a 6 year term commencing July 15, 2000 and expiring July 14, 2006 (Exhibit D to Motion). These leases were boilerplate, "Standard Form of Loft Lease[s]." Although a hand-written insertion in these leases required plaintiff to use the 11<sup>th</sup> Floor Loft solely for commercial purposes as a photography studio, nonetheless, the 11<sup>th</sup> Floor Loft was retrofitted for residential use (e.g., fully equipped kitchens and bathrooms, etc.) and Giovanni occupied the 11<sup>th</sup> Floor Loft for both professional and residential purposes. In or about 2000, Tony Cenicola permanently vacated the 11<sup>th</sup> Floor Loft and Giovanni proceeded to sublet the rear portion of the 11<sup>th</sup> Floor Loft denominated as "11R" (the "Rear Space") to co-defendant, Ezequiel de la Rosa ("Rosa"). Sometime during the ensuing 6 year renewal period, Rosa, because he was a purported tenant of the 12<sup>th</sup> floor of the Building, proceeded to rent the Rear Space to Knehans presumably as a licensee.

On or about May 16, 2006, plaintiff served Rosa and Knehans with a self-described, cautionary Thirty Day-Termination Notice (Exhibit E to Motion) directing co-defendants to vacate and surrender possession of the Rear Space no later than June 30, 2006. Plaintiff then commenced this action by filing and serving a summons and complaint dated July 12, 2006 (Exhibit A to Motion) against Rosa and Knehans *inter alia* for ejectment to recover legal possession of the Rear Space. Rosa did not file an answer and has essentially defaulted in this action, whereas Knehans appeared pro se and filed his answer containing a single affirmative defense, viz., he has a lease with the Owner for the Rear Space entitling him to continued possession thereof.

After joinder of issue, plaintiff served and filed a Note of Issue and moved for summary judgment against Knehans for ejectment and legal possession of the Rear Space. On February 27, 2007, plaintiff's counsel and the two co-defendants appeared in Part 1 for a pre-trial conference. Counsel and Rosa then advised the court that they have settled their differences, that is to say, Rosa was giving up whatever possessory interest he may have had in the Rear Space and plaintiff was discontinuing any claims she had against him. However, Knehans advised the court that he continues to occupy the Rear Space and furnished plaintiff's counsel with an undated copy of his cover letter, a copy of a work sheet for completing a loft lease form and a copy of the loft lease he executed with the Owner for the Rear Space. A motion schedule was agreed to and this court granted Knehans leave to retain counsel and serve/file any opposition to the summary judgment motion no later than March 16, 2007. Plaintiff was then granted leave to file a reply, if any, no later than March 21, 2007.

#### **The Disqualification Motion**

On March 16, 2007, plaintiff's counsel received a service copy of Knehans' opposition papers consisting of Burden's Opposition Affirmation as well as Knehans' Opposition Affidavit, both of which annexed supporting documentation. By letter dated March 21, 2007 and fax-copied to Burden, plaintiff's counsel requested a stay of Giovanni's time to file a reply to Knehans' opposition and in further support of plaintiff's summary judgment motion, and advised the court that plaintiff was moving to disqualify Burden and the Belkin Firm from representing Knehans. On that same day, plaintiff's counsel submitted the proposed OSC, which the court signed, seeking to disqualify Knehans' recently retained counsel based upon an irreconcilable conflict of interest.

The Disqualification Motion cites to DR 5-105(a) and (b) [cross-cited to 22 NYCRR § 1200.24 (a) and (b)] and apprizes the court that Burden and the Belkin Firm are simultaneously representing the Owner in two related litigations commenced within weeks after Giovanni's most recent renewal lease expired on July 14, 2006: one is an action the Owner is prosecuting in the New York County Supreme Court against Giovanni and other similarly situated tenants at the Building captioned *37 West Realty Co. v. Horacio F. Salinas Photography Co., et al.*, Index Number 110387/2006 (the "Rent Action"<sup>2</sup>) (see Summons and Complaint annexed as Exhibit B to Burden Opp. Aff. as Exhibit E to OSC); and the other is a summary holdover proceeding the Owner is prosecuting in the New York County Civil Court against Giovanni to recover possession of the 11<sup>th</sup> Floor Loft captioned *37 West Realty Company v. Tony Cenicola and Raeanne Giovanni-Inoue*, Index Number L&T 085772/06 (the "Holdover") (see Notice of Petition and Verified Petition as Exhibit H to OSC).

After reviewing plaintiff's counsel's affirmation in support of the Disqualification Motion and its annexed documentation, the irreconcilable conflict of interest can be illustratively understood in the following way. In the Holdover, Burden prepared and signed the Petition (also verified by the Owner) which alleges in relevant part, that Giovanni "[is] the tenant[ ] of said premises [i.e., the 11<sup>th</sup> Floor Loft]. . ." which is "described as follows: All rooms, Entire 11<sup>th</sup> Floor in the "B]uilding. . ." (Exhibit G to OSC at ¶¶ 2-3); that Giovanni "continues in possession of the premises without permission of

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<sup>2</sup> The Owner is *inter alia* seeking a declaratory judgment that the Building is not subject to the Loft Law and money judgments for outstanding rent and/or use and occupancy.

the . . . [Owner], after the expiration of the term. . .” (*Id.* at ¶ 5); and that the “fair and reasonable value of . . . [plaintiff’s] use and occupancy of the premises is at the rate of at least \$7000.00 per month. . . [for which Giovanni is] indebted to . . . [the Owner]. . .” (*Id.* at ¶ 8)(bracketed matter added).

In the Rent Action, Burden prepared and signed a Complaint verified by the Owner. Relevant to the Disqualification Motion, this Verified Complaint incorporates by reference certain schedules which list plaintiff as the tenant of the 11<sup>th</sup> Floor Loft and plaintiff’s accruing rent and/or use and occupancy arrears for the 11<sup>th</sup> Floor Loft without demarcating the Rear Space and seeks retroactive rent arrears and prospective rent and/or use and occupancy. Moreover, as recently as March 20, 2007, Burden prepared and filed an order to show cause in the Rent Action (Exhibit I to OSC) seeking a preliminary, mandatory injunction to compel Giovanni and other similarly situated tenants at the Building to pay rent and/or use and occupancy, pendente lite, directly to the Owner or, alternatively, into an escrow account maintained by the Belkin Firm.

To that end, a principal of the Owner attests that “[e]ach of the defendants has taken part in what has essentially become a rent strike, refusing to pay rent for the continued use of their **leased units** and the arrears continually amassing.” (emphasis added) (Kurz Aff. in support of Order to Show Cause at ¶ 12 as Exhibit I to OSC). This supporting affidavit lists Giovanni as the tenant of Unit 11 (the 11<sup>th</sup> Floor Loft) and attaches a March 13, 2007 computer-generated billing record for the 11<sup>th</sup> Floor Loft (and without demarcating the Rear Space) which recorded an outstanding rent arrears sum of \$64,288.69. *Id.*

Contrarily, in this action, Burden has submitted an affirmation containing statements claimed to be true under penalties of perjury that: Giovanni is a commercial tenant whose lease expired on July 14, 2006; she has never occupied the Rear Space which is a separate and distinct space;<sup>3</sup> Knehans is an "occupant" of the Rear Space pursuant to a lease dated July 15, 2006 and has paid monthly rent for the Rear Space since July 2006, to date; and, implicitly, since the Owner is entitled to possession of the Rear Space because it was never Giovanni's primary residence (Burden Opp. Aff. to Motion at ¶ 46), the Owner was able to lease the Rear Space to Knehans and collect rent therefor.

Plaintiff's counsel therefore argues that in the Holdover and Rent Action, Burden and the Belkin Firm have prepared "and submitted multiple sworn statements that flatly contradict the sworn statements put forth by Mr. Burden on behalf of Mr. Knehans in this . . . [ejectment action]. In addition, Mr. Knehans has a possible claim against the [O]wner based upon the seemingly improper issuance of a lease that is the heart of this dispute. . ." (bracketed matter added)(Frazer Aff. in support of OSC at ¶3). Stated more pointedly, with an "equal duty of loyalty to both. . . [the Owner and Knehans], [Burden] cannot plausibly argue the veracity of both his clients' statements because, which ever one is true, the other one must be false. . . [thus] the court has no choice but to disqualify Mr. Burden [and the Belkin Firm] from continued representation of Mr. Knehans." (bracketed matter added)(Frazer Aff. in support of OSC at ¶¶ 15-16).

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<sup>3</sup> Burden prepared Knehans' opposition affidavit which attests to the Rear Space being separated by a demising wall from the 11<sup>th</sup> floor front space which Giovanni occupies and to both spaces having separate entrances, kitchens and bathrooms (see Knehans Opp. Aff. at ¶¶ 8-11).

In opposing the Disqualification Motion, Burden and the Belkin Firm make the following points: (1) plaintiff has failed to meet her heavy burden of showing how the Belkin Firm's simultaneous representation of the Owner and Knehans is inappropriate; (2) the broad description of the "premises" sought to be recovered in the Verified Petition filed in the Holdover was "premised on Plaintiff's own representations in an exercise of caution." (Burden Opp. Aff. to OSC at ¶ 10); (3) Knehans' and the Owner's positions are in consonance with each other, because the Owner contends Giovanni has no right to occupy any portion of the 11<sup>th</sup> Floor Loft after the expiration of her renewal lease and Knehans contends Giovanni has no right to occupy the Rear Space and he does; (4) any hypothetical conflict between the Owner and Knehans which may result in litigation between "themselves is illusory and does not provide a basis for disqualification. . ." (Burden Opp. Aff. to OSC at ¶ 17); (5) as noted in annexed affidavits, both the Owner and Knehans gave informed consent to the Belkin Firm's simultaneous representations after being fully informed of any potential conflict issues; and (6) the court does not have to decide the Disqualification Motion because there is "currently pending before the Office of Administrative Trials and Hearings ("OATH") . . . Plaintiff's application for coverage, which would resolve the issue of her status in the . . . [11<sup>th</sup> Floor Loft], as well as what portion of the . . . [11<sup>th</sup> Floor Loft], if any, Plaintiff is actually entitled to." (bracketed matter added)(Burden Opp. Aff. to OSC at ¶ 24).

By letter hand-delivered on June 8, 2007 and copied to Burden at the Belkin Firm, plaintiff's counsel forwarded a copy of the OATH's Administrative Law Judge's Report and Recommendation dated May 18, 2007 (the "OATH Report"), concerning the pending Loft Board coverage application Giovanni and 17 other similarly situated

tenants in the Building filed, viz., *In the Matter of Tenants of 323-325 West 37<sup>th</sup> Street*, Loft Board Docket No. TR-0768, OATH Index No. 692/06. After a 5 day trial consisting of 8 witnesses, 70 trial exhibits, a joint exhibit of stipulated facts and post-trial briefs, and relevant to the issues raised here, the OATH Report found:

that [Unit] 11<sup>4</sup> qualified for coverage under [MDL] Section 281(4). The undisputed facts establish that . . . [the 11<sup>th</sup> Floor Loft was] residentially occupied during the window period, from April 1, 1980 to May 1, 1987, and that . . . [the 11<sup>th</sup> Floor Loft was] physically converted to accommodate residential use<sup>5</sup>. . . and that [Giovanni] qualifies as a 'prime lessee with a lease currently in effect' and is a protected occupant pursuant to Loft Law regulations. . ." (bracketed matter added)(see OATH Report at pp. 8-9).

The OATH Report further determined the maximum rent which the Owner would otherwise be allowed to charge and collect from Giovanni and concluded that for a prescribed period, plaintiff had been overcharged.

### Discussion

22 NYCRR §1200.24(b) [DR 5-105(b)] states, in relevant part: "A lawyer shall not continue multiple employment [i.e., simultaneous representation of different clients] if

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<sup>4</sup> Illustratively, many of the 18 tenant-petitioners seeking Loft Law coverage occupy loft spaces in the Building denominated as Unit 4F (4<sup>th</sup> floor front space) or Unit 4R (4<sup>th</sup> floor rear space). However, Giovanni's loft was solely denominated as "11" in the Schedule of Tenants made a part of the OATH Report at p.3. This is clearly indicative of plaintiff's position that she is a prime tenant of the 11<sup>th</sup> Floor Loft (the entire 11<sup>th</sup> floor) and, as the OATH Report noted, *infra*, the Administrative Law Judge so found.

<sup>5</sup> Parenthetically, the fact that the 11<sup>th</sup> Floor Loft may have been physically divided into two discrete self-contained units with a demising wall between the 11<sup>th</sup> floor front space and the Rear Space evidently was not fatal to Giovanni's coverage claim. See, e.g., *Sharp v. Melendez*, 139 A.D.2d 262, 531 N.Y.S.2d 554 (1<sup>st</sup> Dept., 1988), *app. den.* 73 N.Y.2d 707, 539 N.Y.S.2d 300 (1989) (two non-contiguous housing accommodations on different floors within the building deemed to constitute a single residential unit and the tenant's primary residence).

the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client. . . ." An attorney can still represent simultaneous clients with differing interests if "a disinterested lawyer would believe that the lawyer may competently represent the interest of each and if each consents to the representation after full disclosure of the implications of simultaneous representation and the advantages and risks involved." (22 NYCRR § 1200.24[c]).

Stating this irreconcilable conflict rhetorically, how is Burden able to advance the notion in this ejectment action that Knehans has lawfully executed a three year lease<sup>6</sup> directly with the Owner for the Rear Space establishing a privity of estate when Giovanni never surrendered her legal possessory interest in the 11<sup>th</sup> Floor Loft of which the Rear Space comprises a part and without any court order granting the Owner a legal right to possession of the 11<sup>th</sup> Floor Loft? Conversely, if Knehans lawfully occupies the Rear Space pursuant to a valid lease and is paying monthly rent therefor, what is the legal efficacy of the Owner prosecuting the Holdover to recover legal possession of the **entire** 11<sup>th</sup> floor (the 11<sup>th</sup> Floor Loft) and *inter alia* seeking rent and/or use and

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<sup>6</sup> This lease commenced on July 15, 2006 and expires on July 14, 2009, at graduated yearly rents (\$1500.00 per month [year 1], \$1650.00 per month [year 2] and \$1800.00 [year 3]). In this context, plaintiff's counsel points out an anomaly, viz., Knehans' copy of the "Worksheet for filling out LOFT LEASE" and the lease he furnished to plaintiff's counsel in open court on February 27, 2007, denominate the leased premises as the "11<sup>th</sup> Floor." However, a March 14, 2007 faxed copy of Knehans' lease attached as Exhibit A to Knehans' Affidavit in Opposition to the summary judgment motion inexplicably contains a circled handwritten notation "#11 REAR."

occupancy in both the Holdover and Rent Action for plaintiff's continued use and occupation of the 11<sup>th</sup> Floor Loft which includes the Rear Space?

This court finds that while Knehans and the Owner appear to be superficially aligned with one another, nonetheless, the legal positions Burden and the Belkin Firm are advancing in sworn documents filed in the Holdover and Rent Action on the Owner's behalf and concomitantly in this action on Knehans' behalf "would likely have . . . a material adverse effect on the interest[s]. . . [of each other]. . ." (bracketed matter added)(see *Matter of the Arbitration between Bringsjord and Salomon Smith Barney, Inc.*, 276 A.D.2d 383, 384, 714 N.Y.S.2d 69, 70 (1<sup>st</sup> Dept., 2000).

Moreover, the OATH Report concluded that Giovanni is a protected tenant of the 11<sup>th</sup> Floor Loft which is subject to the Loft Law. Were the Loft Board to finally adopt the OATH Report, this would render Knehans' claimed possessory interest in the Rear Space a nullity which in turn would render future litigation between Knehans and the Owner not merely possible, but probable (e.g., Knehans' action against the Owner for money damages, etc.).

Nor is this court convinced that the Belkin Firm's opposition to the Disqualification Motion meets the objective test *vis-a-vis* the Owner's and Knehans' consent to their simultaneous representation by the former in the respective litigations, namely, what a disinterested attorney would have to believe to concur with their respective consent to such representation (see *Shaihk v. Waiters*, 185 Misc.2d 52, 56, 710 N.Y.S.2d 873, 876 [Sup. Ct., Nassau Co., 2000]).


Finally, to promote public confidence in New York's civil justice system and avoid the appearance of impropriety, an attorney should not "represent a succeeding client in substantially related matters, regardless of whether consent is given . . . [even under these circumstances where the Owner actually recommended Burden and the Belkin Firm to Knehans]. . ." (bracketed matter added)(*Matter of the Adoption of Gustavo G.*, 9 A.D.3d 102, 112, 776 N.Y.S.2d 15, 21-22 [1<sup>st</sup> Dept., 2004]). This is so "'because the relationships or interests create a substantial *likelihood* of profound conflict . . . [and therefore] representation is not permitted under any circumstances' (*Matter of Kelly*, 23 N.Y.2d 368, 378, 244 N.E.2d 456, 296 N.Y.S.2d 937 [1968][emphasis added]. . ." (bracketed matter added). *Id.*, 9 A.D.3d at 112, 776 N.Y.S.2d at 22.

Based on the foregoing, this court finds that Burden's and the Belkin Firm's simultaneous representation of the Owner and Knehans has created an unwaivable conflict of interest and therefore grants plaintiff's Disqualification Motion. As of the date of this Decision and Order, Burden and the Belkin Firm shall no longer continue to represent Knehans in this action.

The determination of plaintiff's motion for summary judgment shall be stayed until such time as Knehans retains new counsel, if any, and Knehans or his new counsel shall thereafter appear with plaintiff's counsel at a status conference to be held on August 1, 2007 at 9:30 a.m. in Part 1, Room 1127B at 111 Centre Street, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York  
July 11, 2007

  
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HON. MARTIN SHULMAN, J.S.C.

**FILED**  
JUL 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE