

Prestige Fin. Ctr., Inc. v Sky Capital, LLC

2007 NY Slip Op 32636(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0602244/2007

Judge: Marilyn Shafer

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

PRESENT: STAFFEN
Justice

PART 2

PRESTIGE FINANCIAL CENTER
- v -
INC
SKY CAPITAL

INDEX NO. 602244/07
MOTION DATE _____
MOTION SEQ. NO. 001
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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion denied
inasmuch as attached herein

FILED

AUG 22 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/15/07

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J.S.C.

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 – NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 8
Justice

-----X,
PRESTIGE FINANCIAL CENTER, INC., JESUS BRAVO,
LAWRENCE, KIRSHBAUM, and HARRY FRIEDMAN,

INDEX NO. 602244/07

Petitioners,

-against-

MOTION DATE

SKY CAPITAL, LLC.,

MOTION SEQ. NO.

Respondent.

-----X
The following papers were read on this order to show cause: Papers Numbered

Order to Show Cause	1
Petitioner's Memo of Law	2
Answer	3
Affirmation of Steven Altman	4
Affirmation of Steven Shea	5
Respondent's Memo of Law	6
Reply Affidavit	7

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AUG 22 2007
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NEW YORK

Upon the foregoing papers it is ordered that the petition to disqualify counsel is denied and the temporary stay of arbitration vacated.

Petitioners Prestige Financial Center, Inc., Jesus Bravo, Lawrence Kirshbaum, and Harry Friedman (petitioners) move to disqualify Steven Altman (Altman) as counsel for respondent Sky Capital, LLC. (respondent) in an underlying NASD arbitration on grounds that there is a conflict of interest. Petitioners' additional request for a temporary stay of this arbitration was granted by this court pending determination of this proceeding. Petitioners and respondent are New York businesses engaged in securities transactions. At all relevant times, petitioner Jesus Bravo (Bravo) has been employed as a securities representative, initially for respondent, and beginning in March, 2006, for petitioners (Order to Show Cause, pp 2-3). Altman has at all

relevant times been general counsel for respondent.

In support of the order to show cause, Bravo states that while he was employed by respondent in 2006 he was called to testify before the NASD in the course of an internal investigation of respondent's business practices. This is not in dispute. In dispute is Bravo's allegation that Altman represented him personally in this capacity and that Bravo confided in Altman "the nature of my own dealings with clients," some of whom Bravo claims are current clients of petitioners (Order to Show Cause, Affidavit of Bravo, p 2). Bravo also states, and it is generally agreed, that respondent later filed an NASD Statement of Claim against petitioners, alleging Bravo's wrongful solicitation of clients, defamation, and other corporate chicanery. Petitioners argue that Altman should be disqualified since the issues in arbitration are substantially related to Altman's alleged representation of Bravo when Bravo was employed by respondent.

In reply, respondent argues that petitioners moved to disqualify only on the eve of arbitration. Moreover, Altman states that he has been retained by respondent from the very inception of the respondent corporation in 2001 and is widely recognized in this capacity by employees. Altman also states that over the course of the NASD investigation he advised Bravo and other employees that he would represent them in testimony to the NASD only in his capacity as general counsel (Affirmation of Altman). Altman maintains that Bravo was provided counsel to represent him in his individual capacity before the NASD. Petitioners submit in evidence correspondence dated January 23, 2006 from Altman to the NASD stating "I will be representing Jessie Bravo in his capacity as an employee of Sky Capital LLC. Aegis Frumento (Frumento) will be representing Mr. Bravo in his individual capacity" (Altman affirmation, Exhibit C).

Altman states that he was not present at the NASD interview, and that he is uncertain whether the interview actually took place (Affirmation, p 5).

Respondent's chief operating officer Steven Shea (Shea) states that in February of 2006 Bravo requested that an attorney other than Altman to represent him in an individual capacity during his NASD testimony (Affidavit of Shea, ¶7). Shea also confirms that Bravo initially consented to being represented in an individual capacity by Frumento before Bravo changed his mind and appeared unrepresented for his on-the-record NASD testimony (*id.*).

Bravo does not refute these statements or respondent's documentary evidence. In reply, Bravo merely states that he believed Altman was his personal attorney at the time Bravo was employed by respondent, and that he "disclosed confidences to him" on that basis (Reply Affidavit, ¶4). Bravo also reiterates that the NASD investigation concerned sales practices of respondent, that he spoke with Altman about clients who had filed complaints against respondent, and that "these are some of the same clients at issue in the forthcoming NASD arbitration" (*id.*).

Respondent's Statement of Claim alleges, in relevant part, that after Bravo was no longer employed by respondent, he "used . . . stolen information to solicit Sky Capital's customers – also in violation of his contract – and defame his old employer to them" (Order to Show Cause, Exhibit A). Bravo is here alleged to have "pilfered and/or copied confidential documents containing the names of . . . customers," evidently in anticipation of his departure to work for petitioners. Respondents allege that, having gained employment with petitioner, Bravo has allegedly proclaimed to current clients that respondent corporation is something of a sinking ship in financial terms, statements which have given rise to the underlying NASD claim (*id.*).

The Code of Professional Responsibility DR 5-108 (A) (1) (22 NYCRR §1200.27 [a] [1]) provides, in pertinent part, that “a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure . . . thereafter represent another person in the same or a substantially related matter in which that person’s interest are materially adverse to the interests of the former client.” It is well settled that “[a] party seeking disqualification of its adversary’s lawyer pursuant to DR 5-108 (A) (1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse” (*Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 639 [1988]). The First Department has held that disqualification of corporation counsel is required where plaintiff submits conclusive documentary evidence that counsel represented him in an individual capacity in prior proceedings that had a substantial relationship to the instant case (*Cooke v Laidlaw*, 126 AD2d 453 [1st Dept 1987]). Without more, Bravo’s allegation that he discussed company clientele with general counsel does not support an inference that the NASD investigation of 2006 and the eventual arbitration are substantially related. Further, the record reveals that Bravo was not represented by Altman in any testimony over the course of the NASD investigation in respondent’s practices, and that Bravo was appointed individual counsel for such purposes.

On the facts at bar, petitioners have failed to prove that there was a relationship between the movant and opposing counsel or that the matters involved were substantially related. Notably, Bravo does not deny that Altman was absent during Bravo’s testimony before the NASD during the investigation of 2006, if this testimony went forward, nor does Bravo deny that

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respondent offered to provide him with independent counsel for purposes of the proceeding. Second, even taking at face value Bravo's statement that he spoke to Altman concerning business practices and corporate clientele while Bravo was employed by respondent, at issue in the arbitration is Bravo's wrongful solicitation of clients and defamation of respondent, which is not substantially related to the matter under investigation in 2006 (*Cooke v Laidlaw*, 126 AD2d 453, *supra*).

Petitioners' reliance on *Clairmont v Kessler* is inapposite. There, the First Department found documentary evidence supporting disqualification where a medical malpractice attorney had represented defendant doctor in a prior malpractice action and probably acquired confidential information in the prior case likely to be in issue in the malpractice action at bar (*Clairmont v Kessler*, 269 AD2d 168, 169 [1st Dept 2000]). Here, petitioner failed to provide documentary evidence to show substantial similarity of the issues, and counsel for respondent has not "switched sides." Petitioners' reliance on *Cooke* is also unavailing, since they have failed to show that Altman represented Bravo in an individual capacity while Bravo was employed by respondent.

In view of the absence of any evidence of an attorney-client relationship between petitioner Bravo and respondent Altman and the absence of a substantial relationship between the issues in respondent's arbitration claims and in Altman's prior representation in the NASD investigation, the petition must be denied. Since petitioners' claim is without merit, we need not reach the question of whether petitioner should also be barred relief on the basis of their delay.

Accordingly, it is

ORDERED that petition to disqualify counsel is denied; and it is further

ORDERED that the temporary stay of arbitration is vacated.

This constitutes the decision and order of this court.

DATE 8/15/07

MARILYN SHAFER
J.S.C.

J.S.C.

FILED
AUG 22 2007
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