

**Schneider v Robert L. Campagna, Architect, P.C.**

2007 NY Slip Op 32754(U)

August 30, 2007

Supreme Court, Nassau County

Docket Number: 4460-07/

Judge: Thomas P. Phelan

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SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 7  
NASSAU COUNTY

MARK SCHNEIDER and HUGHENA SCHNEIDER,

Plaintiff(s),

-against-

ROBERT L. CAMPAGNA, ARCHITECT, P.C.,  
HARVEY P. STARK, P.E., P.C., THOMAS  
MURPHY & ASSOCIATES, ISLAND  
STRUCTURES ENGINEERING, P.C. and  
VIPA RESTORATION,

Defendant(s).

ORIGINAL RETURN DATE: 06/29/07  
SUBMISSION DATE: 07/24/07 (#1,2,3)  
SUBMISSION DATE: 07/26/07 (#4)

INDEX No.: 4460/07

MOTION SEQUENCE #1,2,3,4

The following papers read on this motion:

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Motion [sequence #1] by defendant Robert L. Campagna, Architect, P.C. [Campagna] for an order dismissing the complaint pursuant to CPLR 3012[b] is denied.

Cross-motion [sequence #2] by plaintiffs Mark Schneider and Hughena Schneider for an order pursuant to CPLR 3012[d] and CPLR 2004, extending their time to serve a complaint, or alternatively, compelling defendant Campagna to accept service of the complaint is granted in accordance herewith.

Motion [sequence #3] by plaintiffs Schneider, brought by Order to Show Cause dated July 2, 2007 [Phelan, J.] for, *inter alia*: (1) an "immediate mandatory injunction" prohibiting Sherri L. Kaplan, Esq., attorney for defendant Campagna, from divulging certain communications she had with the plaintiff Mark Schneider; and (2) disqualifying Kaplan and her firm from representing defendant Campagna in the instant litigation is granted as to disqualification.

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Motion [sequence #4] by defendant Campagna for an order pursuant to, *inter alia*, 22 NYCRR § 130-1.1 sanctioning plaintiff's counsel is denied.

The within negligence and professional malpractice action was commenced by plaintiffs Mark Schneider and Hughena Schneider on or about April 6, 2007 through service of a summons with inscribed notice upon the Secretary of State (Angelillo Aff. dated June 26, 2007, Exh., "1"; Kaplan Aff. dated June 14, 2007, Exh., "A").

In sum, plaintiffs' action is founded on claims arising out of the allegedly faulty design and construction of a new home located adjacent to Manhasset Bay, in Port Washington, New York (Proposed Cmplt., ¶¶ 25-26; 37, 53, 60).

Defendant Campagna prepared certain design drawings for the project.

On May 7, 2007, Campagna served a notice of appearance and demand for complaint pursuant to CPLR 3012[b] – but no response was forthcoming within the statutorily prescribed, 20-day period during which service of the complaint must be made (Campagna Mot., Exh., "B").

However, and according to plaintiffs' counsel, Meyer, Suozzi, English, & Klein, P.C., neither the supervising attorney – partner Abraham B. Krieger – nor the associate assigned to the matter – Robert C. Angelillo – received defendant's demand until June 18, 2007, when Campagna made a motion to dismiss the action pursuant to CPLR 3012[b] (Angelillo Aff. dated June 26, 2007, ¶¶ 8, 10-11, 15, 17 [Exh., "1"]).

Plaintiffs' attorney claims that on June 13, shortly before he received Campagna's dismissal motion on June 18, his firm served a copy of the complaint directly upon Campagna, allegedly in a good faith "attempt to keep a defaulted party apprised of the status of the case, and to give it an additional opportunity to answer the complaint notwithstanding its [perceived] default \* \* \*" (*Id.*, ¶¶ 9-12). Counsel further claims that immediately upon receipt of the motion, he called counsel for Campagna – Sherri Kaplan, Esq. – and requested that she withdraw the application and accept service of the complaint in light of the relatively short delay which ensued ( *Id.*, ¶¶ 13-17).

Kaplan declined plaintiffs' withdrawal request and several days later served a new motion asking that the Court impose sanctions upon plaintiffs' counsel based upon, *inter alia*, their direct service of the complaint on Campagna (*Id.*, ¶ 18).

Kaplan apparently worked for Krieger as an litigation associate for some five years before Krieger dissolved his firm and joined Meyer, Suozzi in or about December, 2006 (Kaplan Aff. dated July 17, 2007, ¶ 6). Notably, the parties' submissions suggest that there is lingering animosity between Krieger and Kaplan arising from the termination of their prior association in 2006 (e.g., *Id.*, ¶¶ 9-10, 32).

[\* 3 ]  
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In light of the foregoing impasse, and by notice dated June 26, 2007, plaintiffs cross moved pursuant to CPLR 3012[d] and CPLR 2004, for an order extending their time to serve the complaint, or alternatively, compelling defendant Campagna to accept service thereof.

Shortly thereafter, plaintiffs moved by order to show cause for (1) relief disqualifying Kaplan and her firm from representing Campagna in the instant litigation; and (2) an "immediate mandatory injunction" prohibiting Kaplan from divulging alleged confidences obtained from Mark Schneider during telephone discussions she had with him during her association with Krieger.

In support of the foregoing application, plaintiff Mark Schneider contends that when he was initially considering instituting the subject action in November of 2006, he consulted the Nassau County Bar Association, which referred him to Krieger's law office (Schneider Aff., ¶¶ 3-7).

Schneider called Krieger's office and his secretary referred him to Kaplan, with whom – plaintiff claims – he discussed the case in great detail. The ensuing discussion allegedly encompassed all factual issues, including those relating to Campagna, as well as strategic considerations and an overall, relative assessment of the strength and weaknesses of the matter (Schneider Aff., ¶¶ 6-11).

Krieger claims that he later had a substantive discussion with Kaplan about the case, which included all pertinent facts and "the best strategy for moving forward \* \* \*" (Krieger Aff., ¶ 15).

Schneider further claims that on at least three additional occasions he spoke to Kaplan about the case (Schneider Aff., ¶¶ 12-13).

One of the conversations allegedly occurred when Schneider independently interviewed and consulted with Kaplan after she had left the Krieger firm and at a point when she had started her own, separate law practice (Schneider Aff., ¶¶ 13-15; Krieger Aff., ¶ 4). According to Schneider, during this call, Kaplan affirmatively solicited him to retain her as his attorney (Schneider Aff., ¶¶ 14-15).

Schneider did not, however, retain Krieger or Kaplan at this juncture, but later retained Meyer, Suozzi after Krieger had joined that firm.

Plaintiffs assert that they were shocked when they discovered that Kaplan was now representing Campagna (Schneider Aff., ¶¶ 16-20).

By letter dated June 21, 2007 – only days after they allegedly received Campagna's dismissal motion – counsel for plaintiffs wrote to Kaplan objecting to her representation of Campagna in light of the conversations she had with Mark Schneider (OSC, Exh., "B"; M. Schneider Aff., ¶¶ 16-20).

Kaplan concedes that she spoke to Schneider in late 2006, but asserts that no privileged or protected communications took place.

More particularly, Kaplan advises that as Krieger's senior associate, she handled most litigation matters for Krieger, but that her duties with the Krieger firm also included, *inter alia*, fielding initial phone call referrals, which – pursuant to instruction from Krieger himself – were to be kept brief, perfunctory and basic in terms of factual detail (Kaplan Aff. in Opp., ¶¶ 4-5).

With respect to Schneider's call in particular, Kaplan claimed that it was only one call and that it very brief and covered only basic information about, *inter alia*, the type of matter involved; Krieger's hourly rates; how a retainer worked; Krieger's personal background as an attorney; and the scheduling of any future appointments (Kaplan Opp. Aff., ¶¶ 6-9).

Nor was there ever a detailed discussion with Krieger about the case or the strategies which might be employed if the firm were to be formally retained (Kaplan Opp. Aff., ¶¶ 8-9).

In reply, Schneider contends that Kaplan's recollection was faulty, since key facts, strategies and confidences were revealed. In further support of his claim, Schneider has annexed telephone records which identify a conversation with the Krieger firm exceeding 30 minutes in total length (Schneider Reply Aff., ¶¶ 4-9).

Turning first to the parties' applications relating to service of the complaint, the Court finds that Campagna's motions for an order dismissing the action pursuant to CPLR 3012[b], and for the imposition of sanctions, should be denied.

Plaintiffs' cross-motion for leave for leave to serve the complaint is granted.

"To avoid dismissal for failure to timely serve a complaint after a demand therefor has been served pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action" (Aquilar v. Nassau Health Care Corp., 40 AD3d 788; Pristavec v. Galligan, 32 AD3d 834).

Nevertheless, "[w]hen exercising its discretion in this regard, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action" ( Aquilar v. Nassau Health Care Corp., *supra*, see, Pristavec v. Galligan, *supra*).

Here, the operative facts support an exercise of the Court's discretion in favor of granting plaintiffs' application.

Although the Court will assume that plaintiffs failed to timely serve their complaint due to law office failure or oversight, the delay was decidedly minimal and defendant Campagna's conclusory assertions fail to establish the existence of any prejudice flowing therefrom (e.g., Kaplan Aff. dated June 14, 2007, ¶ 5) (Giladi v. City of New York, 34 AD3d 733; Jolkovsky v. Legeman, 32 AD3d 418, 419; Bunch v. Dollar Budget, Inc., 12 AD3d 391; see, also, Aquilar v. Nassau Health Care Corp., *supra*).

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Further, it is settled that public policy favors the disposition of disputed matters on the merits (Stuart v. Kushner, 39 AD3d 535; Friedman v. Ostreicher, 22 AD3d 798, 799).

Additionally, and contrary to Campagna's contentions, the record does not support the claim that plaintiffs' conduct was willful or that they "wholly \* \* \* refused" to serve a copy of the complaint in accord with the mandates of CPLR 3012[b]"(Kaplan Aff., ¶ 2) (e.g., Shaheen v. Webster Realty Associates, 16 AD3d 663; Daniels v. Bovis Lend Lease, Inc., 12 AD3d 342). The record indicates in this respect that after the motion to dismiss was made, plaintiffs' counsel contacted Ms. Kaplan and affirmatively offered to serve the complaint provided that the motion to dismiss was withdrawn.

Nor, upon the facts presented can the Court agree that there was anything sanctionable arising from, inter alia, plaintiffs' conduct, including the "direct" service of their pleading upon Campagna.

Likewise, the Court is satisfied that plaintiffs' submissions sufficiently demonstrate the existence of potentially meritorious claims (e.g., Orangetown Policemen's Benevolent Ass'n v. Town of Orangetown, 18 AD3d 841, 842).

Plaintiffs' order to show cause for: (1) an "immediate mandatory injunction"; and (2) for a relief disqualifying Kaplan and her firm from representing the Campagna in the instant litigation is granted in part and denied in part.

There is no question that an attorney must preserve the confidences and secrets of a client and may not "use such information to the disadvantage of the former client or the advantage of a third party" (Tekni-Plex, Inc. v. Meyner and Landis, 89 NY2d 123, 130 [1996]; Kassis v Teacher's Ins. & Annuity Assn., 93 NY2d 611, 616-617 [1999]; Solow v. W.R. Grace & Co., 83 NY2d 303, 308-309 [1994]).

Notably, "it is not necessary for a party seeking disqualification to show that 'confidential information necessarily will be disclosed in the course of the litigation' or to reveal 'the information provided to \* \* \* counsel with specificity,' since '[s]uch a requirement would breach the very confidence sought to be protected'" (Rose Ocko Foundation, Inc. v. Liebovitz, 155 AD2d 426, 426-427; see, also, Jamaica Public Service Co. Ltd. v. AIU Ins. Co., 92 NY2d 631, 638-639 [1998]; Greene v. Greene, 47 NY2d 447, 453; Matter of Hof, 102 AD2d 591, 594).

Rather, "all that is required for disqualification is the adduction of facts 'which would make it reasonable to infer that [the attorney] gained some information about his former client of some value to his present client'" (Matter of Hof, *supra*, at 594, quoting from Silver Chrysler Plymouth v. Chrysler Motors Corp., 370 F Supp 581, 589, *affd*, 518 F2d 751 [2<sup>nd</sup> Cir 1975]; Jamaica Public Service Co. Ltd. v. AIU Ins. Co., *supra*; Mancheski v. Gabelli Group Capital Partners, Inc., 22 AD3d 532, 534; Burton v. Burton, 139 AD2d 554).

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Nor is a formal retention necessary, since "[t]he 'fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view toward retention of the lawyer, although actual employment does not result'" (Seeley v. Seeley, 129 AD2d 625, 627, quoting from, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F2d 1311, 1319 [7<sup>th</sup> Cir. 1978]; Rose Ocko Foundation, Inc. v. Liebovitz, *supra*, at 426-427; Burton v. Burton, *supra*; Leisman v. Leisman, 208 AD2d 688; I Heng Ngan v. Wei Su, 13 Misc.3d 1229(A), 2006 WL 3026422 [Supreme Court, Kings County 2006]).

Applying these principles to facts presented, the Court agrees that plaintiffs have sustained their burden on the motion.

There is no dispute that the same factual transactions underlie both the 2006 discussions and the instant lawsuit, in which Kaplan has now appeared as counsel for one of plaintiffs' adversaries. Moreover, while Kaplan asserts that nothing of import was discussed and that a single, perfunctory discussion ensued, Mr. Schneider contends that there were several detailed discussions, which encompassed potential strategies and an overall assessment of the strengths and weaknesses of the case (see, Seeley v. Seeley, *supra*, at 627; I Heng Ngan v. Wei Su, *supra*, Slip Opn at 2).

Buttressing plaintiffs' account is evidence indicating that there were several calls made and that one of the telephonic conferences lasted in excess of 30 minutes, thereby undermining the assertion that the communications were entirely perfunctory in scope. In any event, it has been observed that, "[e]ven the briefest conversation between a lawyer and a client can result in the disclosure of confidences" ( Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186, 189, 195 [7<sup>th</sup> Cir.1979 en banc]; Hughes v. Paine, Webber, Jackson & Curtis Inc., 565 F.Supp. 663, 670 [N.D. Ill.1983]). Nor is it unreasonable to infer upon the facts presented here, that before an counsel provides a prospective client with cost projections – or discusses the matters identified by Kaplan herself in her opposing affirmation – counsel will likely have first has obtained "confidential information from the client respecting the subject matter of the engagement"(cf., Hughes v. Paine, Webber, Jackson & Curtis Inc., *supra*, at 670; see, Burton v. Burton, *supra*).

Additionally, plaintiffs objected to Kaplan's representation at an early, pleading stage of the matter, both by letter and prompt application to the Court – conduct militating against Campagna's claim that the application was made solely to acquire some tactical advantage or to delay the subject litigation (Burton v. Burton, *supra*, at 554-555; cf., Tekni-Plex, Inc. v. Meyner and Landis, *supra*, at 131-132).

In sum, while "the parties dispute what was actually disclosed", the alleged communications "could, even inadvertently, provide a strategic advantage" to Campagna (Rose Ocko Foundation, Inc. v. Liebovitz, *supra*, at 428). "[I]t is incumbent upon the attorney to avoid even the appearance of professional impropriety" and doubts as to the existence of a conflict of interest must be resolved in favor of disqualification (Mancheski v. Gabelli Group Capital Partners, Inc.,

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supra, at 534; see, In re Isaiah Dejohn S., 37 AD3d 725; Rose Ocko Foundation, Inc. v. Liebovitz, supra, at 428; see, also, Matter of Kelly, 23 NY2d 368, 376 [1968]; Matter of Hof, supra, at 595).

Under these circumstances, the Court finds agrees that the prudent course of action is to disqualify Kaplan and her law firm from further participation in the litigation (see, Seeley v. Seeley, supra).

Finally, that branch of plaintiffs' order to show cause which is for a mandatory injunction is denied.

In general, mandatory injunctive relief will "rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action" (Matos v. City of New York, 21 AD3d 936; see, Nat Holding Corp. v. Banks, 22 AD3d 471; SHS Baisley, LLC v. Res Land, Inc., 18 AD3d 727; Rosa Hair Stylists v. Jaber Food Corp., 218 AD2d 793, 794).

Here, Kaplan has been disqualified, and the operative facts do not warrant or require the granting of additional injunctive relief against an officer of the court in good standing as an adjunct or supplement to the disqualification remedy already awarded.

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief in excess of that granted above.

Accordingly, it is,

**ORDERED**, that the cross-motion by plaintiffs Mark Schneider and Hughena Schneider for an order pursuant to CPLR 3012[d] and CPLR 2004, extending their time to serve the complaint, or alternatively, compelling defendant Campagna to accept service of their complaint, is granted to the extent that the complaint in the form annexed to plaintiffs' cross-motion is deemed served (Aquilar v. Nassau Health Care Corp., 40 AD3d 788), and it is further,

**ORDERED**, that defendant Campagna's time to serve its answer shall be extended until 20 days after service upon it a copy of this decision and order (Giarguaro S.p.A. v. Amko Intern. Trading, Inc., 300 AD2d 349, 350; Santiago v. County of Suffolk, 280 AD2d 594); and it is further,

**ORDERED**, that such service shall be made upon defendant Robert L. Campagna, Architect, P.C. by both ordinary mail to the last known address of Robert L. Campagna, Architect, P.C. and pursuant to CPLR 2103(b) upon Sherri L. Kaplan, Esq.; and it is further

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ORDERED, that motions by defendant Robert L. Campagna, Architect, P.C., for: (1) an order dismissing the complaint pursuant to CPLR 3012[b]; and (2) for the imposition of sanctions, are denied; and it is further,

ORDERED, that the order to show cause by plaintiffs Schneider is granted to the extent that Sherri L. Kaplan, Esq. and the Law Offices of Sherri L. Kaplan, shall be disqualified from representing defendant Robert L. Campagna, Architect, P.C. in the instant litigation, and the order to show cause is otherwise denied; and it is further

ORDERED, that a Preliminary Conference shall be held in this matter on October 16, 2007 at 2:30 P.M. in the Preliminary Conference area, lower level of this courthouse.

This decision constitutes the order of the court.

Dated: 8-30-07

HON THOMAS P. PHELAN

~~THOMAS P. PHELAN~~

**ENTERED**

J.S.C.

SEP 04 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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