

Max Tec Constr. v The Cedarbrook Club

2007 NY Slip Op 32818(U)

September 4, 2007

Supreme Court, Nassau County

Docket Number: 1269-06/

Judge: Leonard B. Austin

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No. 1269-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 4-30-07
Submission Date: 6-6-07
Motion Sequence No.: 002,003/MOT D

MAX TEC CONSTRUCTION,
Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Perry & Campanelli, LLP
129 Front Street
Mineola, New York 11501

THE CEDARBROOK CLUB, THE
CEDARBROOK CLUB, INC., OLD CEDAR
DEVELOPMENT CORP., individually and as a
general partner of The Cedarbrook Club,
DANIEL ABITOL, individually and as a general
partner of the Cedarbrook Club, M. PIERRE
RAFIY, individually and as a general partner of
The Cedarbrook Club, SAID AMIRIAN,
individually and as a general partner of The
Cedarbrook Club, ELYAHOO AMIRIAN,
individually and as a general partner of The
Cedarbrook Club, KOUROSH JAVAHERI,
individually and as a general partner of The
Cedarbrook Club, JOHN JAVAHERI,
individually and as a general partner of The
Cedarbrook Club, JAVAD KHAVARIAN,
individually and as a general partner of the
Cedarbrook Club, P. KHAVARIAN, individually
and as a general partner of the Cedarbrook
Club, J. LAVI, individually and as a general
partner of the Cedarbrook Club, PARVIZ LAVI,
individually and as a general partner of the
Cedarbrook Club, HARVEY MANES,
individually and as a general partner of the
Cedarbrook Club, B. MANES, individually and
as a general partner of the Cedarbrook Club,
AYOUB MAOINIAN, individually and as a
general partner of the Cedarbrook Club,
ANGELA MOTTAHEDEH, individually and as a
general partner of the Cedarbrook Club, P.
MOINIAN, individually and as a general partner
of the Cedarbrook Club, NOURI SASSOUNI,
individually and as a general partner of the
Cedarbrook Club, NEJATOLAH SASSOUNI,

COUNSEL FOR DEFENDANTS
(for Old Cedar Development Corp., The
Cedarbrook Club, Inc.)
Levin & Chetkof, LLP
265 Post Avenue - Suite 290
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(for Abitbol, Rafiy, Manes)
Gabay-Rafiy & Bowler, LLP
584 Broadway - Suite 507
New York, New York 10012

(for Lavi, Mottahedeh)
Naidich, Wurman, Birnbaum & Maday,
LLP)
80 Cuttermill Road - Suite 410
Great Neck, New York 11021

(for Khavarian)
Michael Montesano, Esq.
14 Glen Street - Suite 308
Glen Cove, New York 11542

individually and as a general partner of the Cedarbrook Club, "JOHN DOE" and "JANE DOE" #'s 1-15, individually, and personally, representing the fictitious names of individuals whose full names are unknown to Plaintiff, and were at all relevant times herein, general partners of The Cedarbrook Club,

Defendants,

_____ x

ORDER

The following papers were read on Plaintiff's motion to disqualify Michael Chetkof, Esq. and the law firm of Levin & Chetkof, LLP from representing the Defendants Old Cedar Development Corp., The Cedarbrook Club, Inc. and the individual Defendants and the cross-motion of Defendants Old Cedar Development Corp. and The Cedarbrook Club, Inc. to disqualify Andrew J. Campanelli, Esq. and the law firm of Perry & Campanelli, LLP from representing the Plaintiff and for sanctions:

- Notice of Motion dated March 26, 2007;
- Affirmation of Andrew J. Campanelli, Esq. dated March 28, 2007;
- Affidavit of Kooros James Khavarian sworn to on November 9, 2004;
- Notice of Cross-motion dated May 18, 2007;
- Affirmation of Michael G. Levin, Esq. dated May 18, 2007;
- Affidavit of Daniel Abitol sworn to on May 17, 2007;
- Affirmation of Anne Marie Bowler, Esq. dated May 24, 2007;
- Affirmation of Andrew J. Campanelli, Esq. dated May 23, 2007;
- Affirmation of Michael G. Levin, Esq. dated May 31, 2007.

Plaintiff, Max Tec Construction ("Max Tec"), moves for an order disqualifying Michael G. Levin, Esq. and the law firm of Levin and Chetkof, LLP. from representing Old Cedar Development Corp, The Cedarbrook Club, Inc., or any of the individual Defendants in this action, on the grounds that such representation presents a conflict of interest. Defendants, The Cedarbrook Club, The Cedarbrook Club, Inc., and Old Cedar Development Corp. (collectively referred to as the "Corporate Defendants"), cross-

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move for an order disqualifying Andrew J. Campanelli, Esq. and the law firm of Perry & Campanelli, LLP. from representing Max Tec upon the grounds that such representation presents a conflict of interest, alternatively, that such representation violates the advocate-witness rule, and awarding sanctions.

BACKGROUND

In this contract action, Max Tec seeks to recover for an alleged breach of a contract for the remediation of soil and ground water contamination at the premises owned by Defendant, Old Cedar Development Corp. ("Old Cedar"), and leased to Defendant, The Cedarbrook Club, Inc. Old Cedar entered into a purchase and lease-back agreement with The Cedarbrook Club, Inc., a not-for-profit corporation which operates a golf/country club at the premises.

On these competing applications, the moving parties seek to disqualify each other's counsel. Max Tec seeks disqualification of Michael Levin, Esq. ("Levin") based upon a conflict of interest, although Max Tec does not claim to be a present or former client of Levin.

The corporate Defendants seek disqualification of Andrew Campanelli, Esq. (Campanelli). Campanelli formerly represented James Khavarian ("Khavarian"), who is not a party in this lawsuit, although he did execute, in his corporate capacity, the contract which is the subject of this action. However, Campanelli did not represent the corporate Defendants in an earlier lawsuit against Khavarian. Campanelli represented Khavarian.

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Max Tec avers that Levin should be disqualified from acting as counsel for Corporate Defendants upon the grounds that there is a conflict of interest between the Corporate Defendants and the individual Defendants, whom Levin represented on a prior motion to dismiss, and on the grounds that Max Tec intends to call Levin as a witness.

DISCUSSION

A. Plaintiff's Motion

1. *Conflict of Interest*

Plaintiff and Defendant seek disqualification of the adverse attorney. It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the court. Campolongo v. Campolongo, 2 A.D. 3d 476 (2nd Dept. 2003). In exercising that discretion, it must be remembered that a party's entitlement to be represented in an ongoing litigation by counsel of his own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. Horn v. Municipal Information Services, Inc., 282 A.D. 2d 712 (2nd Dept. 2001); and Ohmoz v. Town of Fishkill, 258 A.D. 2d 447 (2nd Dept. 1999). See gen'lly, Cardinale v. Golinello, 43 N.Y. 2d 288 (1977); and Eisenstadt v. Eisenstadt, 282 A.D. 2d 570 (2nd Dept. 2001).

The moving party bears the burden of demonstrating clear grounds for disqualification on its motion. In deciding whether a conflict requiring disqualification exists, the court must consider if the lawyer or firm has previously represented the party

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or entity which is seeking the disqualification of that attorney and/or if the attorney has obtained, in the course of that representation, confidential information which would be disclosed or could be used against the former client in the current litigation. Wissler v. Ashkinazy, 299 A.D. 2d 352 (2nd Dept. 2002); and Ogilvie v. McDonald's Corp., 294 A.D. 2d 550 (2nd Dept. 2002). See, gen'ly, Tekni-Plex, Inc. v. Meyner and Landis, 89 N.Y. 2d 123 (1996).

In order to succeed on the motion to disqualify an adversary's lawyer pursuant to 22 NYCRR 1200.27 (DR 5-108), a movant must prove the existence of an attorney client relationship between the movant 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. Solow v. W. R. Grace & Co., 83 N.Y. 2d 303, 309 (1994). See also, Kassis v. Teacher's Ins. & Annuity Assn., 93 N.Y. 2d 611, 615-6 (1999). An irrebuttable presumption of disqualification arises only where all three elements are established. Janaica Public Services, Co. Ltd. v/ AIU Ins. Co., 92 N.Y. 2d 631, 636 (1998).

The individual Defendants who have standing are now represented by independent counsel. They have not sought Levin's disqualification. Accordingly, it is unnecessary to address the remaining factors for disqualification. Disqualification based upon Levin's former representation of the individual Defendants must be denied.

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B. Advocate – Witness

2. *Advocate - Witness Rule*

The Code of Professional Responsibility provides a guide for attorneys regarding their professional conduct. When raised in a litigation, it cannot be considered as statutory or decisional law. The Code of Professional Responsibility, however, provides guidance to the court. S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y. 2d 437 (1987).

The right of a party to an action to select his or her own attorney is a valuable and almost inviolate right. The attorney should not be disqualified unless there is a clear showing that disqualification is warranted. *Id.*; and Eisenstadt v. Eisenstadt, 282 A.D. 2d 570 (2nd Dept. 2001).

An attorney should not accept employment in a matter if the lawyer knows, or it is obvious, that he/she will be called to testify on a significant issue on behalf of a client. 22 NYCRR 1200.21(a) [DR5-102(a)]. The attorney may represent the client and testify if his/her testimony relates solely to uncontested matter, matters of formality which are not in dispute, the testimony relates to the nature and value of legal services rendered on behalf of the client in the action or disqualification would work a substantial hardship to the client due to the distinctive value of the attorney's services in the case. 22 NYCRR 1200.21(a) [DR5-102(a)(1)-(4)].

Likewise, neither an attorney nor his/her firm should accept employment in contemplated or pending litigation if the attorney knows or it is obvious that the specific

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attorney or another attorney with the firm may be called as a witness on a significant issue "... other than on behalf of the client, and it is apparent that the testimony would or might be prejudice to the client. "22 NYCRR 1200.21 (b) [DR 5-102 (b)].

The party seeking to disqualify an attorney bears the burden of establishing that the attorney will be called as a witness at trial and that the attorney's testimony is necessary. Eisenstadt v. Eisenstadt, *supra*; and Morgansen v. Federated Consultant Services, Inc., 174 A.D. 2d 656 (2nd Dept. 1991). See also, Lik Lamellen U. Kupplungsbau GmnH v. Lerner, 167 A.D. 2d 451 (2nd Dept. 1990). When determining if the attorney's testimony is necessary, the court must take into account factors such as "...the significance of the matter, weight of the testimony, and the availability of other evidence." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 446. See also, Eisenstadt v. Eisenstadt, *supra*.

Testimony which is "relevant and even highly useful" is not strictly necessary (Morgasen v Federated Consultant Service, *supra*), and an opposing party's intent to call the attorney as a witness is neither sufficient nor dispositive. Burdett Radiology Consultants, P.C. v. Samaritan Hosp., 158 A.D. 2d 132, 134 (3rd Dept. 1990). Whether the testimony is necessary will turn upon the "significance of matters" for which testimony is required, the "weight" of the testimony and the "availability of other evidence." Morgasen v Federated Consultant Service, *supra* at 656.

Moreover, a party who intends to call an adversary's attorney bears the additional "heavy burden" of "identifying the projected testimony of the

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advocate-witness and demonstrating how it would be 'so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification'." Broadwhite Assoc. v. Truong, 237 A.D. 2d 162, 163 (1st Dept 1997), quoting Martinez v Suozzi, 186 A.D. 2d 378, 379 (1st Dept 1992). See also, Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D. 2d 64, 76 (1st Dept. 2002).

Max Tec has failed to identify the testimony it would elicit from Levin. Nor had it shown that such testimony would be adverse to the account of events to be offered by his clients. As here, "mere conclusory assertions . . . that testimony by the [Defendant's] counsel may be prejudicial to his client are insufficient to merit counsel's removal." Haberman v. City of Long Beach, 298 A.D. 2d 497, 499 (2nd Dept. 2002), *lv. app. den.*, 3 N.Y. 3d 601 (2004), *cert den.*, 543 U.S. 1086 (2005). See also, S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra*. Moreover, the delay of almost one year in seeking disqualification renders Max Tec's application suspect. See, St. Barnabas Hosp. v. New York City Health and Hosp. Corp., 7 A.D. 3d 83, 90 (1st Dept. 2004).

Thus, Levin's disqualification based upon the advocate-witness rule must be denied.

3. *Other Considerations*

Max Tec refers to, and relies upon, Levin's disqualification from acting on behalf of both the individual and corporate Defendants in a pending shareholder's derivative action. However, a copy of the order has not been submitted. Nor have the issues and

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the conflict been sufficiently identified to permit a determination whether they are relevant to this proceeding for breach of contract.

In order to fully address the allegations of Max Tec regarding disqualification of Levin, notwithstanding its lack of standing, it is noted that the papers submitted contain allegations of misfeasance and wrongdoing by the Old Cedar Development Corporation with respect to the not-for-profit Cedarbrook Club, Inc. This is an action for breach of contract. There is no apparent conflict between the positions of the two corporations as tenant and landlord with an indemnification agreement. Max Tec has failed to specify how the alleged wrongdoing is relevant to the contract issues now before the Court. The allegations are wholly insufficient to support the disqualification motion. Under all the circumstances, the motion to disqualify Michael Levin, Esq. must be denied in all aspects.

B. Defendants' Cross-Motion

1. *Dual Representation*

Defendants' identify three bases for Campanelli's disqualification. First, there is an allegation that Campanelli represented both parties to the contract which is the subject of this proceeding.

In response, Campanelli avers that he did not have any role with regard to negotiation or execution of the subject contract. This claim is unrefuted. Campanelli represented Kooros James Khavarian ("Khavarian"), who is a signatory to the subject contract, as officer of the Cedarbrook Club, Inc., in litigation commenced by the

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Corporate Defendants against Khavarian. Campanelli clearly could not represent both the plaintiffs and defendant in the same action. Any reliance upon a purported attorney- client relation between the Cedarbrook Club, Inc. or the other corporate Defendant and Campanelli based upon Khavarian's employee status must be rejected. Accordingly, as the corporate Defendants are not former clients of Campanelli, DR 5-108(a)(1) (22 NYCRR 1200.27[a][1]) is not implicated. Indeed, the same issue of standing is presented in analyzing Max Tec's motion.

2. *Use of Confidential Information*

The Corporate Defendants also allege a violation of DR 5-108(a)(2), contending that Campanelli was exposed to and is using corporate confidential information received from his former client, Khavarian. This claim is based on the corporate documents he has submitted on behalf of Max Tec.

With regard to a former client, 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." DR 5-108 (a)(2) (22 NYCRR 1200.27[a][2]). Confidences refer to "information protected by the attorney-client privilege under applicable law", and secrets refer to "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Jamaica Public Service Co. Ltd. v. AIU Ins. Co., *supra* at 637. See also, Kern, Suslow Securities v. Baytree Assoc., 249 A.D. 2d 74 (1st Dept. 1998) ("a written agreement by the

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attorneys not to disclose certain information about defendant's principal in exchange for the principal's cooperation" constituted a client secret).

The Corporate Defendants claim that Campanelli has revealed the secrets of Khavarian, his former client, and has put him in jeopardy for "pilfering" corporate documents. They have not indicated the nature of Khavarian's relationship to the corporations or why he could not lawfully access those corporate documents. See, e.g., Business Corporation Law § 624; Not-for-Profit Corporation Law § 621. Certainly, there is no basis to believe that such corporate documents would be unavailable if sought in discovery.

Campanelli avers that the evidence submitted was gathered from public sources and papers filed by the Corporate Defendants in multiple orders to show cause in a previous case. Thus, he claims, there can be no reasonable claim that they are confidential or secret. In reply, the Corporate Defendants aver that a certain credit application and check do not appear in any of the County Clerk files. They also aver that Campanelli, as counsel to Khavarian, had access to "sensitive" corporate information which he would not have had absent the association with Khavarian.

Disqualification motions present competing concerns. "Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party's right to representation by counsel of choice and danger that such motions can become tactical 'derailment' weapons for strategic advantage in litigation." Jamaica Public Service Co.

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Ltd. v. AIU Ins. Co., *supra* at 638. See also, S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra*.

Here again, the Corporate Defendants do not have a prior relationship with the attorney they seek to have disqualified. Thus, they must offer “more” to secure the disqualification of Campanelli. *Id.* “[G]eneralized assertions of ‘access to confidences and secrets’ would both make it difficult, if not impossible, to test those assertions and encourage the strategic use of such motions” or allow a finding that an attorney’s information is “secret” or a “confidence”. *Id.* With respect to two bank documents specifically identified by the Corporate Defendants as not part of the County Clerk’s records, the documents are clearly not confidential information protected by the attorney- client privilege as they are bank documents which can be discovered directly from the Corporate Defendants or by subpoenaing the bank. Accordingly, the motion to disqualify pursuant to DR 5-108(A)(2) must be denied.

C. Advocate - Witness Rule

The Corporate Defendants also seek to disqualify Campanelli on the grounds that they will call him as a witness to the relationship between Khavarian and George Parker, president of Max Tec. They allege that Khavarian and Parker conspired to defraud the Corporate Defendants via a sham contract to remediate soil and water contamination, and that Campanelli is a witness to their relationship.

The movants have not shown that Campanelli is the only witness to any alleged relationship between Parker and Khavarian. Thus, his testimony has not been shown

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to be necessary. See, Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D. 2d 64, 76 (1st Dept. 2002) ["no witness other than (counsel) will be able to provide the necessary evidence to void the agreement as executory or based on fraud"]. Moreover, with respect to the nature of the contract, the evidence includes several communications from the New York State Department of Environmental Conservation directing that contamination remediation commence. Such evidence casts serious doubt on the claim that there was no contamination or need for remediation.

Accordingly, the Corporate Defendants have failed to make the necessary showing to support disqualification of Campanelli under the advocate-witness rule. See, Morgasen v. Federated Consultant Service, *supra*.

Accordingly, it is,

ORDERED, that Plaintiff's motion to disqualify Michael G. Levin, Esq. and the law firm of Levin and Chetkof, LLP is **denied**; and it is further,

ORDERED, that Defendants' cross-motion to disqualify Andrew J. Campanelli, Esq. and the law firm of Perry & Campanelli, LLP is **denied**; and it is further,

ORDERED, that counsel shall appear for a status hearing on September 18, 2007 at 9:30 a.m.

This constitutes the decision and Order of the Court.

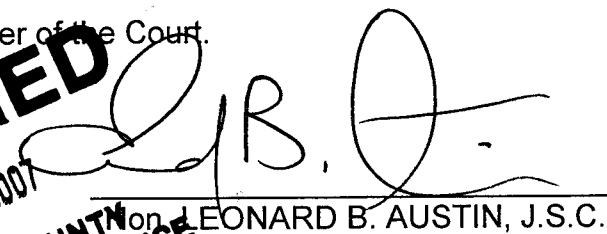
Dated: Mineola, NY
 September 4, 2007

ENTERED

SFP 11 2007

**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**

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 LEONARD B. AUSTIN, J.S.C.