

**Anchor Holdings Group, Inc. v Rogak**

2007 NY Slip Op 32909(U)

September 12, 2007

Supreme Court, New York County

Docket Number: 4240-06/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
ANCHOR HOLDINGS GROUP, INC.,  
THE ANCHOR GROUP, INC. and ANF  
GLOBAL LIBERTY INSURANCE  
COMPANY OF NY,

Plaintiffs,

-against-

LAWRENCE N. ROGAK,

Defendant.

\_\_\_\_\_

TRIAL/IAS, PART 6  
NASSAU COUNTY

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MOTION DATE: July 26, 2007  
Motion Sequence # 001, 002

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... X

This motion, by plaintiffs, for an order lifting the stay imposed after the plaintiff's original counsel's death and setting forth a discovery schedule, together with such other and further relief as may be just and proper; and a cross-motion, by defendant, for an order disqualifying the law firm of Brand, Glick & Brand as counsel for plaintiffs herein, along with such further relief as to the Court may seem just and proper, are **both** determined as hereinafter set forth.

This action arises out of a failed lawyer (defendant)-clients (plaintiffs) relationship, in which the plaintiffs allege that the defendant has not timely forwarded mail and other documents to the plaintiffs; that the defendant owes the plaintiffs for costs and expenses for

offices occupied and utilized, by the defendant, during the pendency of, and pursuant to, the contract between the parties, and that the defendant owes the plaintiffs \$68,000 for payments due under a promissory note.

Plaintiffs' counsel states that plaintiff's original attorney, Mr. Robert Carlucci, passed away on January 27, 2007 and new counsel, the firm of Brand, Glick & Brand, P.C., was retained on January 31, 2007. The defendant, pro se, was informed of these events on February 13, 2007, and he objected, by letter of February 14, 2007, on the grounds of a conflict of interest. This Court stayed this action on February 21, 2007, in that no proper substitution of counsel had been effected. Subsequently, a conference was held in Court, and this motion ensued.

Plaintiffs' attorney argues that the proper substitution procedure for the replacement of counsel was complied with after the untimely demise of plaintiffs' original attorney. He contends that the procedure for replacing a deceased attorney is different from that mandated when a living attorney is to be replaced, since any retainer/contract terminates with the death of one of the parties, and the stay should be lifted.

The defendant, in his cross-motion, notes his pro se status, and avers his personal knowledge of the facts. He describes his factual perspective of the instant relationship; that his occupation of the suite in the plaintiff's building was to be rent free unless and until his firm's revenue reached a level above that of payroll and expenses, and then only to the extent of 50% of the expenses. He avers that the plaintiff's president reneged on his promises and improperly retained the law firm's checkbook, and hired away his two non-equity partners. He further avers that the plaintiffs' principal forced him to sign a promissory note in exchange for permission to move out. He contends that \$45,000 was taken out of the defendant's account without his knowledge or consent; and that the first cause of action was fabricated and ultimately withdrawn. He argues that one of the associates in the plaintiffs' law firm was a partner in the defendant's firm for ten years until she left in July 2005; that she did extensive work on the plaintiffs' cases and is the subject (with the defendant as the principal of the law firm) of an open and pending complaint before the Grievance Committee; and that she perpetrated several "unethical and deceitful" acts to siphon off clients of the defendant's firm. The defendant further argues that by reason of this close collaboration between the plaintiffs' house counsel and the plaintiffs' firm's associate places the plaintiffs' firm in a clear conflict and an obvious improper position which necessitates the disqualification of plaintiffs' counsel.

In reply, plaintiffs' attorney avers that the defendant's failure to oppose his motion and that his cross-motion seeks disqualification of his firm implies his consent to the motion. Counsel contends that the plaintiffs' firm's hiring of the attorney from the defendant's office occurred well prior to the events which form the basis of this litigation. Counsel points out that the defendant does not allege that such attorney has/had any knowledge of the defendant's affairs with the plaintiffs, nor that such attorney had any knowledge of the relationship during the period relevant to the litigation. Counsel contends that the attorney employed by the plaintiffs' law firm who was employed by the defendant handled only no-fault claims and they are not the subject of this litigation; and that attorney denies possession of any confidential information, which is not identified by the defendant. He further contends that no disciplinary rules have been cited by the defendant, and asserts that none have been violated.

### DECISION

An analysis of the procedural history and facts surrounding the retention of plaintiffs' counsel, in conjunction with the lack of any opposition to the vacatur of the stay, said stay is, in fact, vacated. The motion is granted.

The defendant's cross-motion presents a different issue, which must be addressed only now, after the stay has been lifted, i.e., whether the retention, by the plaintiff, of the firm of Brand, Glick and Brand, which employs Carolyn Rankin, a former partner of the defendant, presents a conflict of interest, or whether the employment, by the plaintiff as house counsel, of Rhonda Barry and Tamara Post, who were non-equity partners of the defendant, together or separately constitute a conflict of interest.

Initially, the Court notes that, while the defendant makes no reference to the Disciplinary Rules in his application, his allegation of a conflict of interest and reliance upon case law relevant to such Rules makes it clear that consideration of that body of law is necessary. With that in mind this Court recognizes "that the provisions of the Code of Professional Responsibility are not to be elevated to the status of decisional or statutory law . . ." and is not indifferent to the Code (Matter of the Estate of Weinstock, 40 NY2d 1, 386 NYS2d 1, 1976).

With respect to the case law which the defendant relies upon to protect him from the apprehension of facing counsel who were formerly on his payroll, i.e., Desbiens v Ford Motor Company, (81 AD2d 707, 3d Dept., 1981), it must be noted that, in that case, the

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attorneys for the defendant actually examined the plaintiff's file on the case and evaluated it for the purposes of litigation and liability. Such is not the case herein, as plaintiffs' counsel has pointed out with respect to Ms. Rankin, who left defendant's office in July 2005, some months prior to the inception of the short term relationship between the plaintiff and the defendant. Nor does the fact, that the defendant and Ms. Rankin are "co-subjects" of a complaint before the Grievance Committee for the Tenth Judicial District, convince this Court that a conflict exists. Ms. Rankin's alleged "unethical and deceitful" [Rogak affirmation ¶31 b] acts do not appear to be grounds for disqualification. He further states that ". . .the subject matter of the lawsuit concerns the work and services which my firm performed for Global" [¶ 32], but fails to offer more than ". . .generalized assertions of 'access to confidences and secrets' . . ." (Jamaica Public Service Co. Ltd. v AIU Insurance Co., 92 NY2d 631, 684 NYS2d 459, 1998).

In the case at bar, the defendant argues for disqualification, not for the common reasons of disclosure of client confidences or secret information, but that he would be ". . .at a distinct disadvantage. . ." in this litigation with a former client. This Court does not perceive that the defendant has met his burden that there is a substantial relation between the subject attorneys, Rankin, Post and Barry's respective employment with the defendant, and the legal activities related to the facts surrounding this action (see, e.g., Schwed v General Electric Co., 990 F Supp 113 [N.D., NY, 1998]).

Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice (see, Matter of Abrams [John Anonymous], 62 NY2d 183). The right to counsel of choice is not absolute and may be overridden where necessary—for example, to protect a compelling public interest—but it is a valued right and any restrictions must be carefully scrutinized (*id.*, at 196). Moreover,

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we cannot ignore that where the Code of Professional Responsibility is invoked not in a disciplinary proceeding to punish a lawyer's own transgression, but in the context of an ongoing lawsuit, disqualification of a plaintiff's law firm can stall and derail the proceedings, redounding to the strategic advantage of one party over another (see, e.g., Allegaert v Perot, 565 F2d 246; see also, Note, The Advocate-Witness Rule: If Z, Then X. But Why?, 52 NYU L Rev 1365).

(S&S Hotel Ventures Limited Partnership v 777 S.H. Corp., 69 NY2d 437, 443, 1987).

Guided by that rationale (see also, Jamaica Public Service v AIU, supra) and determination, this Court denies the defendant's application.

To summarize, the plaintiff's motion is granted and the defendant's cross-motion is denied.

A status conference is scheduled for October 10, 2007 at 9:30 a.m. in Chambers of the undersigned.

Dated SEP 12 2007

*Stephen Bucaria*  
J.S.C.

ENTERED

SEP 14 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE