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

PRESENT: Cahn Justice

PART 49m

James L. Melcher

INDEX NO. 604047/03

MOTION DATE

- v -

MOTION SEQ. NO. 012

MOTION CAL. NO.

Apollo Medical Fund et al

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is denied as per annexed decision.

FILED
NOV 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11-7-07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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JAMES L. MELCHER,

Plaintiff,

-against-

APOLLO MEDICAL FUND MANAGEMENT L.L.C. and BRANDON FRADD,

Defendants.

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Index No. 604047/03



**Herman Cahn, J.**

Plaintiff, James L. Melcher, moves for an order that the Court recuse itself from further participation in this action, 22 NYCRR § 100.3(E). The basis for the application is that one of the Court's sons is an attorney employed at Greenberg Traurig L.L.P., which represents defendants in this action. Further, a separate action has apparently been commenced by plaintiff against Greenberg Traurig, alleging misconduct in connection with matters involved herein.

**BACKGROUND**

For a complete discussion of the underlying facts, see the Court's decision, dated September 10, 2004. The relevant facts to this motion are summarized below.

Apollo Medical Fund Management L.L.C. ("Apollo Management") was formed to act as the general partner of Apollo Medical Partners, L.P. ("Apollo Partners"), a hedge fund that invests in companies in the biotechnology and medical device industries. Defendant Brandon Fradd is the manager of Apollo Management.

In January 1998, Melcher, Fradd and non-party Jeff Eliot Margolis entered into an

Operating Agreement, whereby Margolis and Melcher became managers and members of Apollo Management. Pursuant to the Operating Agreement, Fradd would be compensated based on the percentage of Apollo Partners' assets that existed at the time Melcher and Margolis became members, and the three of them would then be compensated equally on the percentage of the assets added thereafter. By May 1998, Margolis was removed as a manager and member of Apollo Management.

Plaintiff alleges that, at some point in 2000, he discovered that he was being underpaid his share of net profits. Melcher states that he was continuously entitled to be compensated as an equal partner of Apollo Management. Plaintiff alleges that he first attempted to resolve this payment issue with Fradd amicably. However, when this approach failed, plaintiff commenced this action.

Fradd, on the other hand, contends that plaintiff failed to fulfill his responsibilities to review research and perform technical analysis of the companies Apollo Partners was to invest in. Fradd maintains that after he spoke to plaintiff about his failure to participate, they orally agreed to amend the Operating Agreement to reflect each of their levels of participation and, in turn, their shares of net profits.

Fradd alleges that as a result of their discussion, he contacted Apollo Management's law firm, Lowenthal, Landau, Fischer & Bring, P.C., to draft an amendment to the Operating Agreement. He further alleges that, pursuant to the oral agreement and the amendment, he was to receive 100% of the net profits of the assets he brought into Apollo Partners and that he and plaintiff were each entitled to 50% of the net profits of the assets that plaintiff brought in. Fradd alleges that he signed the amendment in May 1998. However, Melcher denies that there was any

amendment. Thus, whether there was an agreement to amend the original agreement, and whether such an amendment was drafted and signed, is an important issue herein.

Plaintiff alleges that the day after this action was commenced, Fradd destroyed key evidence to prevent forensic ink-dating that would have shown that the amendment was a recent fabrication created by Fradd in December 2003 and backdated five and a half years. Fradd asserts that the document was burned by accident, in his kitchen. Defendants argue that the burned document was genuine, but that Lowenthal, Landau, Fischer & Bring, P.C. had gone out of existence and the drafter of the document, James Beckwith, Esq., was retired and living in Vermont, and would not return phone calls. In any event, James Beckwith was eventually deposed in Brattleboro, Vermont.

In response, plaintiff alleges that he recently discovered defendants' statements about Mr. Beckwith to be untrue and that they were made in an attempt to deceive the plaintiff and the Court. Plaintiff also accuses defendants' law firm, Greenberg Traurig, and especially Leslie Corwin, Esq., the attorney who is defendants' lead counsel, in assisting in the alleged deceit. In a separate motion, plaintiff has moved to strike defendants' pleadings as a result of spoliation of evidence and deceit related to such. Plaintiff has also brought a separate action against Greenberg Traurig for treble damages relating to its alleged actions in defending this action on behalf of its clients.

In short, this action has unfortunately deteriorated to one where counsel makes accusations against the adversary. It is scheduled for an early trial.

Issue of Recusal

Some time after the commencement of this action, one of the undersigned's sons, who

was recently admitted to the Bar, became employed by Greenberg Traurig as an associate in their corporate department. At the time, the Court advised counsel for all parties of this. All counsel specifically advised the Court that they waived any right of recusal they might have based on such employment.

The Court notes that Greenberg Traurig is a large firm of 1,700 attorneys.[1] The Court's son is an employee (an associate) of the firm.

Some time after the waiver, when relations between counsel deteriorated, the motion to recuse was made.

**DISCUSSION**

The motion is denied.

Plaintiff argues that the Court should recuse itself, 22 NYCRR § 100.3, because the Court's son is an attorney at Greenberg Traurig and that firm's alleged misconduct is in question with regard to spoliation of evidence.

Defendants oppose the motion, contending that plaintiff waived his right to request recusal, by failing to do so at an earlier time and specifically agreeing that the employment was not a ground for recusal. Defendants state that, at the time the Court disclosed this potential issue, Melcher had already accused defendants' attorney of wrongdoing and, therefore, should have requested that the Court recuse itself then, instead of one year later and several months prior to the trial.

Defendants also argue that the Court's son does not have "an interest that could be substantially affected by this litigation." 22 NYCRR 100.3(E)(1)(d)(iii). Defendants maintain

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[1] As per the firm's website, http://www.gtlaw.com/about (last visited Nov. 7, 2007).

that law firms are frequently subject to actions regarding their conduct and the outcome would not substantially affect the interests of their associates. Defendants also point out that this case is over three years old, and should proceed without further delay, especially since this action will be tried by a jury and, therefore, the jury – not the judge – will decide the outcome. *Cf. Solow v W.R. Grace & Co.*, 83 NY2d 303 (1994).

The Court again notes that plaintiff was given the opportunity to request recusal at an earlier time, and did not. When the parties appeared for a conference on July 25, 2006, they were informed that the Court's son had recently accepted a position at Greenberg Traurig and would commence his employment later that year. The attorneys had the chance to object, yet both attorneys agreed on the record that the Court should continue to preside over the action. Plaintiff maintains that he now requests recusal based on new information regarding Greenberg Traurig's involvement in the alleged deceit regarding the amendment and its destruction. However, this alleged misconduct does not involve the Court's son and does not make the Court any less impartial.

New York courts have consistently held that "[a]bsent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal." *People v Moreno*, 70 NY2d 403, 406 (1987). Pursuant to Judiciary Law § 14, a judge is only disqualified from hearing a case "to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

The rules regarding disqualification of a judge where a judge's impartiality could reasonably be questioned can be found in 22 NYCRR § 100.3(E)(1). Plaintiff specifically requests recusal based on subsection (d), which states that a judge shall disqualify himself where

"a person known by the judge to be within the sixth degree of relationship to [him] . . . (iii) has an interest that could be substantially affected by the proceeding."

This particular language is important because, while disqualification is not limited to the instances solely described in the rule, it does provide guidelines. The rule could have been written so that a judge would be required to recuse himself whenever a person within the sixth degree of relationship to him was involved in any action in any way. Instead, the rule states that a judge should disqualify himself when he knows someone within the sixth degree of relationship to him and another prerequisite is met, for example, that person is a party to the proceeding, an officer, director or trustee of a party, or has an interest that could be substantially affected.

Therefore, the focus in this proceeding lies on whether the Court's son would be substantially affected by this proceeding, and not just simply whether the Court's son has *any* connection to this lawsuit. The Court's son is currently an associate in Greenberg Traurig, in the corporate department. While young associates are a vital part of the structure of large firms, they do not normally, at this point in their careers, have a substantial stake in the cases and clients that the law firms represent. It is reasonable to assume that young attorneys are interested in the reputation and financial well-being of the firm for which they work; however, this particular action does not rise to the level of affecting Greenberg Traurig on such a grand scale that it would have any significant impact on its associates.

The Court also notes that his son is an emancipated adult, who lives independently of the undersigned. *See Pestar v Remington Arms Co., Inc.*, 111 Misc 2d 364 (NY Sup Ct 1981); *see also Crites v Radtke*, 29 F Supp 970 (SDNY 1939).

Plaintiff reminds the Court that it has recused itself in *D'Amour v Ohrenstein Brown*,

another action where one party is represented by Greenberg Traurig. However, the facts in that case, as to the waiver, were substantially different.[2] It is a fact-specific determination. Every action is not the same and different facts well lead to different results.

For all the above reasons, the Court does not find it necessary to recuse itself in this action.

Accordingly, it is

ORDERED that the motion for recusal is denied; and it is further

ORDERED that the clerk enter judgment accordingly.

Dated: November 7, 2007

ENTER:

J.S.C.



[2] The Court will not engage in a comparison between the two cases because *D'Amour v Ohrenstein Brown* remains a pending case.