SHORT FORM ORDER

INDEX
NO.: 13985-06

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

x

RAY VUONO,

Plaintiff,

-against-

INTERPHARM HOLDINGS, INC., f/k/a ATEC GROUP, INC.,

Defendant.

x

ELLENOFF GROSSMAN & SCHOLE LLP
Attorneys for Plaintiff
370 Lexington Avenue
New York, New York 10017

GUZOV OFSINK, LLC
Attorneys for Defendant
600 Madison Avenue, 14th Floor
New York, New York 10022

DECISION AND ORDER AFTER HEARING

By an order dated March 29, 2007, the court granted, in part, the motion by the defendant for an order dismissing the complaint and referred to a hearing the cross motion by the plaintiff for an order disqualifying the defendant's counsel. The hearing was held on September 24, 2007, after which the parties submitted memoranda of law. Upon the evidence presented at the hearing and the papers submitted in support of and in opposition to the cross motion, it is

ORDERED that the cross motion is denied.

On July 1, 2002, the plaintiff and Atec Group, Inc. (hereinafter "Atec"), entered into an advisory agreement in which the plaintiff agreed to introduce Atec to potential investors, mergers, acquisitions, and other similar transactions and to act as Atec's advisor in matters related to mergers and acquisitions, corporate finance activities, and disposition of assets, among other things. The agreement provided that the plaintiff was to receive a fee of 8% for any transactions he introduced to Atec with a value of $5 million or less and 5% for any transactions with a value of more than $5 million. The agreement also provided that, if the plaintiff performed due diligence with respect to a potential transaction, he was to be compensated at a rate of $200 per hour or such other amount as agreed upon with Atec. Finally, the agreement gave the plaintiff a right of first refusal to act as a finder for any merger, acquisition or similar transaction, or financing activity Atec pursued during the period of his engagement.

Pursuant to the terms of their agreement, the plaintiff introduced Atec to Interpharm, Inc., a subsidiary of the defendant Interpharm Holdings, Inc. Atec and Interpharm, Inc. negotiated a plan for a reverse merger in which Atec would nominally become Interpharm Holdings, and non-party Baar Group, Inc., an entity formed solely for the purpose of acquiring Atec's assets, would purchase Atec's computer operations and assume certain of Atec's liabilities. By a letter agreement dated October 16, 2002, which was signed by the plaintiff and the President of Atec, the plaintiff agreed to accept a flat fee of $75,000 for his work on the transaction. The plaintiff subsequently agreed to accept 335,000 shares of Atec stock in lieu of the aforementioned $75,000.

The plaintiff commenced this action, inter alia, to recover damages for breach of contract. The plaintiff alleged that the $75,000 already paid to him was for his due diligence work only and that the defendant owed him finder's fees for the Atec reverse merger. The plaintiff further alleged that the defendant did not honor his right of first refusal to act as a finder for two additional transactions and that the defendant owed him finder's fees in connection with those transactions. The defendant moved to dismiss the complaint, and the plaintiff cross moved to disqualify the defendant's counsel. By an order dated March 29, 2007, the court granted the defendant's motion only insofar as the plaintiff sought damages for his work on the Atec reverse merger and left intact his claim for finder's fees in connection with the two additional transactions. The cross motion was referred to a hearing.

The plaintiff contends that the defendant's counsel should be disqualified on the ground that the law firm previously represented him on substantially related matters. Under DR 5-108 (A) (1), a party seeking to disqualify an attorney or a law firm on the ground of prior representation must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and the former client are materially adverse (*see*, **Tekni-Plex, Inc. v Meyner & Landis,** 89 NY2d 123, 131, *citing* **Solow v Grace & Co.**, 83 NY2d 303, 308; *see also*, **Talvy v American Red Cross in Greater N.Y.**, 205 AD2d 143, 148, *affd* 87 NY2d 826). The moving party must satisfy all three criteria in order to give rise to a presumption of disqualification of opposing counsel (*see*, **Hakimian Mgt. Corp. v Fiore**, 16 Misc 3d 1108[A] at *3, *citing* **Tekni-Plex, Inc. v Meyner & Landis**, *supra* at 131).

The plaintiff has failed to establish the existence of a prior attorney-client relationship between him and the defendant's counsel. The record establishes that the law firm that represents the defendant, Guzov Ofsink, LLC (hereinafter "Guzov Ofsink"), previously represented Western Media Group Corporation (hereinafter "Western Media") and two other corporations in which the plaintiff had an ownership interest. However, the fact that Guzov Ofsink represented those corporations did not render the plaintiff a client of the firm, unless Guzov Ofsink assumed an affirmative duty to represent him (*see*, **Walker v Saftler, Saftler & Kirschner**, 239 AD2d 252, 253; Kushner v Herman, 215 AD2d 633). There is no evidence in the record that Guzov Ofsink assumed an affirmative duty to represent the plaintiff. The plaintiff testified that Western Media had a retainer agreement with Guzov Ofsink and that he relied on the firm for legal advice related to all aspects of the company's corporate affairs, including litigation and public filings. The plaintiff testified that Guzov Ofsink never prepared a will or trust for him or his family, that Guzov Ofsink never represented him in a marital or family matter, that Guzov Ofsink never represented

him in connection with the purchase or sale of a home or real property, and that Guzov Ofsink never represented him in any personal injury matters. The plaintiff acknowledged that, although Guzov Ofsink negotiated three employment agreements with Western Media, including his own, the firm represented Western Media, not him or the other employees.

The record does not support the plaintiff's contention that he sought and received legal advice from Guzov Ofsink about personal legal issues. For example, the plaintiff contends that he spoke privately with Guzov Ofsink about an FBI investigation that was non-public, unreported, and not a Western Media corporate matter. However, the record reveals that the FBI was not investigating the plaintiff or even Western Media, but an unaffiliated broker who was trading in Western Media stock. Moreover, the FBI wanted to speak to the other two principals of Western Media, as well as the plaintiff, and Guzov Ofsink referred them to another attorney whom they subsequently retained.

In connection with the firm's representation of Western Media, the plaintiff filled out a questionnaire for directors, executive officers, and principal stockholders, which he contends contained a wide range of non-public, personal information. The questionnaire indicated on its face that the information provided was to be used in connection with Western Media's annual report and filings with the Security and Exchange Commission (hereinafter "SEC"). Thus, it presumably was not to remain confidential, and it was used in connection with Guzov Ofsink's representation of Western Media, not the plaintiff personally. Moreover, the plaintiff has failed to demonstrate how such information is substantially related to the present litigation (*see*, **Lightning Park v Wise Lerman & Katz**, 197 AD2d 52, 55). A party seeking disqualification has not meet its burden by offering generalized assertions of access to confidences and secrets (*see*, **Jamaica Pub. Serv. Co. v AIU Ins. Co.**, 92 NY2d 631, 638; *see also*, **Cremers v Brennan**, 196 Misc 2d 262, 267).

The plaintiff contends that, because of their long-standing relationship, Guzov Ofsink knew whether or not he was registered as a broker with the SEC. Although the plaintiff's status as a securities broker is an issue in this litigation, whether or not the plaintiff is registered with the SEC is a matter of public record. Moreover, the plaintiff has failed to demonstrate that Guzov Ofsink has specific confidential information about whether the plaintiff acted as a broker (*see*, **Lightning Park v Wise Lerman and Katz**, *supra* at 55). The plaintiff's generalized assertions that Guzov Ofsink would have known whether the plaintiff was in the business of selling securities are insufficient (*see*, **Cremers v Brennan**, *supra* at 267).

Finally, there is no evidence in the record that the firm represented the plaintiff in connection with the Atec reverse merger. The plaintiff testified that, while Guzov Ofsink was still representing Western Media, he discussed the transaction with Darren Guzov of Guzov Ofsink at a meeting at which others were present. However, the plaintiff admitted that Guzov Ofsink did not represent him personally in negotiating the advisory agreement that is at the heart of this action. Moreover, Darren Ofsink testified that he did not provide any legal services to the plaintiff individually and that he did not perform any legal services for Western Media or the plaintiff's two other corporations that were in any way connected with the advisory agreement. Although he discussed the advisory agreement with the plaintiff in late 2003 in order to respond to a comment

letter received by the defendant from the American Stock Exchange, those discussions centered around the due diligence services provided. The plaintiff's due diligence services are not at issue in this action. In fact, the court has already dismissed the complaint insofar as the plaintiff sought damages for his work on the Atec reverse merger. Thus, the only issue that remains is the plaintiff's entitlement to finder's fees in connection with the two additional transactions. There is no evidence in the record that Guzov Ofsink represented the plaintiff in connection with those transactions.

In view of the foregoing, the court finds that the plaintiff has failed to establish that there exists a reasonable probability that DR 5-108 would be violated (*see*, **Jamaica Pub. Serv. Co. v AIU Ins. Co.**, *supra* at 638; **Cremers v Brennan**, *supra* at 267).

The plaintiff also contends that the defendant's counsel should be disqualified under DR 5-102 on the ground that Guzov Ofsink is a necessary witness because of its involvement in the negotiation, drafting, and interpretation of the contracts related to the Atec reverse merger, including the advisory agreement and the October 16, 2002, letter agreement. When, as here, a party moves to disqualify an opposing party's attorney on the ground that the attorney will be called as a witness at trial, the movant bears the burden of establishing that the attorney's testimony will be necessary. A finding of necessity takes into account such factors as the significance of the matters, the weight of the testimony, and the availability of other evidence (*see*, **Eisenstadt v Eisenstadt**, 282 AD2d 570, *citing*, **S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.**, 69 NY2d 437, 445-446). Taking these factors into consideration, the court finds that the testimony of the defendant's counsel is not necessary.

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations. When there is a written agreement that purports to express the parties' entire agreement, extrinsic evidence that contradicts, varies, or explains the agreement is generally barred by the parol evidence rule. Similarly, extrinsic or parol evidence is not admissible to create an ambiguity in a written agreement that is otherwise clear and unambiguous (*see*, **Del Vecchio v Cohen**, 288 AD2d 426, 427-428 [and cases cited therein]).

The court has already found the October 16, 2002, letter agreement to be unambiguous, and the plaintiff does not contend that the advisory agreement is ambiguous. Moreover, the advisory agreement indicates that it contains the entire understanding between the parties and supersedes any prior understanding or written or oral agreements between them regarding the subject matter thereof. Thus, any testimony by Guzov Ofsink that contradicts, varies, or explains either the letter agreement or the advisory agreement is barred by the parol evidence rule.

Finally, the defendant contends that Guzov Ofsink has factual knowledge of the plaintiff's status as a broker and of the terms of the Atec reverse merger. However, the plaintiff also has firsthand knowledge of those subjects. Thus, any testimony by Guzov Ofsink would be cumulative (*see*, **Eisenstadt v Eisenstadt**, *supra* at 571; **S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.**, *supra* at 446). Accordingly, the motion is denied.

DATED: December 17, 2007

HON. ELIZABETH HAZLITT EMERSON

J. S.C.