

**M.A.C. Duff, Inc. v ASMAC, LLC**

2007 NY Slip Op 34313(U)

December 28, 2007

Supreme Court, Suffolk County

Docket Number: 0030810/2006

Judge: Elizabeth H. Emerson

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

PRESENT: Hon. Elizabeth Hazlitt Emerson

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M.A.C. DUFF, INC. D/B/A PACIFIC EAST  
RESTAURANT, MICHAEL CASTINO and MICHAEL  
CASTINO, JR.,

Plaintiffs,

MELTZER, LIPPE, GOLDSTEIN &  
BREITSTONE, LLP  
Attorneys for Plaintiffs  
190 Willis Avenue  
Mineola, New York 11501

-against-

ASMAC, LLC, ARAM SABET and MOSS & KALISH  
PLLC,

Defendants.

MOSS & KALISH, PLLC  
Attorneys for Defendants  
122 East 42<sup>nd</sup> Street, Suite 2100  
New York, New York 10168

This matter involves a dispute over the ownership of defendant ASMAC, LLC (hereinafter "ASMAC"), a New York limited liability company, which owns a valuable parcel of commercial real property in Amagansett, New York. In fact, the parties have agreed that, notwithstanding the many claims raised during the pendency of this litigation, the only issue before this court is the ownership of ASMAC. To streamline the process, the parties requested and the court agreed to conduct a trial to determine this critical issue. Following the completion of a portion of the testimony, the plaintiffs renewed a previous request to make an oral motion to disqualify the defendants' counsel, Moss & Kalish, PLLC (hereinafter "Moss & Kalish"). The court granted such request and adjourned the trial to give Moss & Kalish an opportunity to consider voluntarily withdrawing and, if it did not, to give both sides an opportunity to submit memoranda of law in support of and in opposition to the plaintiffs' motion. In an attorney's affirmation dated November 2, 2007, Moss & Kalish advised the court that it will continue to represent the defendants. Upon the papers submitted in support of and in opposition to the plaintiffs' motion, it is

**ORDERED** that the motion is granted to the extent that Moss & Kalish is disqualified from representing the defendants in this action; and it is further

**ORDERED** that all proceedings in this matter are stayed for 60 days from the date

of service of this order so that the defendants may have an opportunity to obtain new counsel; and it is further

**ORDERED** that the parties are directed to appear for a conference with the court on March 18, 2008 at 9:30 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901; provided, however, that the defendants' new counsel may at any time contact the court to request that such date be advanced; and it is further

**ORDERED** that the motion is otherwise denied.

The plaintiff Michael Castino, Jr. (hereinafter "Castino Junior") and another individual were the original shareholders of the plaintiff MAC Duff, Inc. (hereinafter "MAC Duff"), which owned and operated the Pacific East Restaurant. MAC Duff leased the premises on which the restaurant was located from Struk Properties. The lease contained an option to purchase the property. In 2000, the defendant Aram Sabet (hereinafter "Sabet Junior") purchased a 50% interest in MAC Duff. Following the consummation of such purchase, Castino Junior and Sabet Junior each owned 50% of MAC Duff. Some time in 2000, Struk Properties filed for bankruptcy. Castino Junior and Sabet Junior attempted to exercise the option to purchase the property set forth in the lease. However, the Trustee in Bankruptcy, in order to maximize the property's value, rejected their exercise and conducted an auction for the real property. In July 2000, Moss & Kalish, acting through one of its associates, Larry Lazar, Esq., represented Castino Junior and Sabet Junior at the bankruptcy auction at which they were the successful bidders. There is no dispute that Moss & Kalish represented both parties before the Bankruptcy Court and in connection with the acquisition of the real property that is at the heart of the dispute before this court. In addition to making appearances in the Bankruptcy Court, Mr. Lazar negotiated and prepared a contract to purchase the property, which was signed by Castino Junior and Sabet Junior. Mr. Lazar also formed the defendant ASMAC, the entity created to take title to the property, and he prepared and distributed certain documentation regarding shareholder action.

As noted above, the property was to be purchased by ASMAC, which was to be owned equally by Castino Junior and Sabet Junior. However, because Castino Junior had a poor credit rating and in order to obtain financing to complete the purchase, Castino Junior directed that his interest in ASMAC be held by his father, a science teacher in New Jersey, the plaintiff Michael Castino (hereinafter "Castino Senior"). Notwithstanding the foregoing, ASMAC was unable to obtain financing from third-party sources. The defendants allege that Sabet Junior's father, Hormoz Sabet (hereinafter "Sabet Senior"), agreed to fund the purchase on the condition that his son be the sole owner of ASMAC. The defendants further allege that Castino Senior assigned the interest held by him for the benefit of Castino Junior to Sabet Junior by executing the assignment form on the back of his ASMAC membership certificate. In support thereof, the defendants have produced a membership certificate that is marked cancelled. Both Castino Junior and Castino Senior, however, deny any knowledge of the purported assignment. Further, they both deny that they agreed to surrender any of their interest in ASMAC. At the closing on October 4, 2000, ASMAC purchased the property. Larry Lazar negotiated and prepared all of the closing documents and represented ASMAC at the closing. The Castinos did not attend the closing.

Moss & Kalish acknowledged that all of the documentation related to ASMAC including, without limitation, the membership certificates and any documentation purporting to transfer the Castinos' interest was prepared by Moss & Kalish. However, the record is devoid of any evidence that Moss & Kalish discussed with, described to, or advised either Castino about the purported transfer of his interest in ASMAC. Further, Mr. Kalish acknowledged to the court that he does not recall having a discussion with either Castino regarding termination of Moss & Kalish's representation. Accordingly, he could not say precisely when such representation ended.

The parties owned and operated Pacific East until 2006, when they reached a parting of the ways. Upon the belief that the defendants had placed the property for sale, the plaintiffs commenced this action, *inter alia*, for a judgment declaring that Castino Senior has a 50% membership interest in ASMAC. The defendants contend that Sabet Junior is the sole owner of ASMAC. In support thereof, the defendants are prepared to offer the aforementioned assignment form purportedly bearing Castino Senior's signature. The plaintiffs respond that such signature, if genuine, was obtained inappropriately. Such an argument requires an understanding of the manner in which the assignment and other documents were presented and explained to Castino Senior and the advice given to him in connection with the need to execute them. Only those associated with Moss & Kalish can answer such questions. Accordingly, the defendants seek to call Larry Lazar as a witness to testify regarding the formation of ASMAC and Castino Senior's purported assignment of his interest therein to Sabet Junior. The plaintiffs contend that Moss & Kalish's representation of the defendants violates DR 5-102 (Lawyers as Witnesses), DR 5-105 (Conflict of Interest; Simultaneous Representation), and DR 5-108 (Conflict of Interest; Former Client).

Preliminarily, the court notes that, although Moss & Kalish was an original defendant in this action, by a so-ordered stipulation dated February 6, 2007, the action was discontinued against Moss & Kalish.

Contrary to the defendants' contentions, the plaintiffs' motion is timely. As the parties are aware, counsel for the plaintiffs raised the issue of Moss & Kalish's disqualification at one of the court's initial conferences with the parties and from time to time during the pendency of this action. The court indicated that it would consider a motion to disqualify Moss & Kalish at the appropriate time and suggested to counsel for the plaintiffs that he refrain from making such a motion until it became clear that it would be necessary and appropriate, and not merely a tactical device. Once the court commenced hearing evidence on the issue of ownership of ASMAC, it became clear that there were questions regarding the scope of Moss & Kalish's actions and that its actions were so central to the issue before the court that Larry Lazar, and possibly Mark Kalish, Esq., should be called as witnesses by the defendants. At that point, the plaintiffs made an oral motion to disqualify Moss & Kalish.

In support of their contention that there is no impediment to Moss & Kalish's continued representation in this case, the defendants contend that there never was an attorney-client relationship between Castino Senior and Moss & Kalish. The record is clear that Castino Senior was not a principal, nor was he an active participant, in any of the transactions described herein. Rather, he was merely a nominee for Castino Junior. Moreover, the parties do not dispute

that this device gave Castino Senior no independent role in the transaction and that it was disclosed to and accepted by Sabet Junior and Moss & Kalish. The court finds that, because of Castino Senior's close relationship with his son, whom Moss & Kalish openly acknowledges it represented, and the reason for Castino Senior's insertion into the transaction, Moss & Kalish vicariously represented Castino Senior (*see, Clear Channel Spectacolor Media LLC v Times Square JV LLC*, 16 Misc 3d 1141[A] at \*2).

Although Moss & Kalish clearly no longer represents the Castinos, it cannot be determined from the record exactly when Moss & Kalish's representation of them ended. As previously discussed, Moss & Kalish never advised the Castinos that the representation had ended. Moss & Kalish continued to bill the Castinos and/or MAC Duff for legal services throughout the relevant period and to correspond and/or discuss with the Castinos on legal matters even after the closing. Moreover, Moss & Kalish did not obtain a conflict waiver or advise Castino Senior of any conflict of interest or to obtain independent counsel when he purportedly executed the assignment of his interest in ASMAC to Sabet Junior. The court finds that, clearly at the point of the purported transfer, the interests of the Castinos differed from those of Sabet Junior and Moss & Kalish's continued representation of the Castinos violated DR 5-105.

In view of the central role that Mr. Lazar played in the negotiation and preparation of documents related to the purchase of the property and the transfer of the Castinos' interest therein, the court finds that his testimony is both relevant and necessary (*see, Sokolow, Dunaud, Mercadier & Carreras, LLP v Lacher*, 299 AD2d 64, 74-75; *Shiboleth v Yerushalmi*, 268 AD2d 300). Accordingly, the court finds that Larry Lazar is disqualified from representing the defendants pursuant to the advocate-witness rule found in DR 5-102 (A). However, the real issue is whether the entire law firm of Moss & Kalish is disqualified from representing the defendants in this action. Pursuant to DR 5-102 (A), a law firm is permitted to continue to represent a client even if one of its attorneys will testify on behalf of the client (*see, Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 152, *affd* 84 NY2d 826; *Zaccaro v Bowers*, 2 Misc 3d 733, 736), but when the attorney is called as a witness other than on behalf of the client and the testimony may be prejudicial to the client, both the attorney-witness and the law firm are disqualified from representing the client (*see, DR 5-102 [B] & [D]*). Here, the attorney-witness will be called to testify not only on behalf of his current client, but also against his former client.

The disqualification of an attorney is a matter that rests within the sound discretion of the court (*see, Columbus Constr. Co. v Petrillo Builders Supply Corp.*, 20 AD3d 383). 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 the right to representation by the attorney of its choice and, in the context of an ongoing lawsuit, can stall and derail the proceedings, redounding to the strategic advantage of one party over another (*see, S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443). Considering all the significant interests to be balanced, it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation. Disqualification of a party's chosen counsel is a severe remedy that should only be done in cases in which counsel's conduct will probably taint the underlying trial (*see, Mancheski v Gabelli Group*

**Capital Partners, Inc.**, 22 AD3d 532, 534; **S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.**, *supra* at 444-445).

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.**, *supra* at 148). 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). Moreover, when one attorney in a law firm is disqualified from representing a client based on a conflict of interest with a former client, all of the attorneys in that firm are likewise precluded from such representation (*see*, Code of Professional Responsibility DR 5-105 [D]; **Kassis v Teacher's Ins. Assn.** 93 NY2d 611, 616; **Hakimian Mgt. Corp. v Fiore**, *supra* at \*5).

The movants have established all three criteria. It is clear that the Castinos had a prior attorney-client relationship with the firm of Moss & Kalish through Larry Lazar. There is no dispute that the interests of the Castinos and Sabet Junior are adverse, and the matter in which Moss & Kalish formerly represented the Castinos is substantially related to the matter that is the subject of this action. Moreover, there is evidence in the record that Mark Kalish, who presumably supervised Mr. Lazar, had discussions with the parties on a variety of issues related to the transaction. Not only did Mr. Kalish have communications with Castino Junior at critical points during the transaction, but Sabet Senior considered him to be his primary attorney. It appears that Mr. Kalish had extensive personal involvement in every aspect of the underlying transaction that led to this lawsuit. Under these circumstances, the court finds that it is likely he will be a necessary witness and that there is a real and present danger that his personal interests will infringe on his professional representation in ways deleterious to his former client (*cf.*, **Gleason v Zocco**, 941 F Supp 32, 35).

Regardless of whether Moss & Kalish obtained and disseminated confidential information in connection with its former representation, the Castinos are entitled to freedom from apprehension and to certainty that their interests will not be prejudiced due to Moss & Kalish's representation of the defendants in this action (*see*, **Columbus Constr. Co. v Petrillo Builders Supply Corp.**, *supra* at 384, *citing* **Cardinale v Golinello**, 43 NY2d 288, 296). The standards of the profession exist for the protection and assurance of the clients and are demanding. An attorney must avoid not only the fact, but even the appearance, of representing conflicting interests. With rare and conditional exceptions, a lawyer may not, even inadvertently, place himself in a position in which a conflicting interest may affect, or give the appearance of affecting, the obligations of the professional relationship (*see*, **Cardinale v Golinello**, *supra* at 296). By mandating disqualification irrespective of any actual detriment, the rule avoids any suggestion of impropriety on the part of the attorney, which preserves the client's expectation of loyalty and promotes public confidence in the integrity of the Bar (*see*, **Tekni-Plex v Meyner & Landis**, *supra* at 131).

While the court is reluctant to insert itself into the decision of counsel for the defendants, the court is aware that any doubts as to the existence of a conflict should be resolved in favor of disqualification (*see, Chang v Chang*, 190 AD2d 311, 319). The court has considering all of the competing interests to be balanced, including that the trial of this action may be tainted by Moss & Kalish's participation therein and the hardship to defendants in denying them the counsel of their choice. The court finds that, on balance, the potential for taint in this case far outweighs any hardship including, without limitation, any additional costs or delay. Moreover, the defendants have been aware of the plaintiff's application from the very beginning of this proceeding and, presumably, have considered disqualification as a possible result. Finally, the court will take all appropriate steps to mitigate any potential hardships. Accordingly, Moss & Kalish is disqualified as counsel for the defendants.

DATED: December 28, 2007

**HON. ELIZABETH HAZLITT EMERSON**

J. S.C.