

Applehead Pictures, LLC v Perelman

2008 NY Slip Op 30573(U)

February 25, 2008

Supreme Court, New York County

Docket Number: 0602606/2007

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

APPLEHEAD PICTURES, LLC,

Plaintiff,

- v -

RONALD O. PERELMAN,

Defendant

Index No.: 602606/07
Motion Date: 10/02/07
Motion Seq. No.: 01
Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this order to show cause to disqualify petitioners' attorneys.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

FILED
MAR 03 2008
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, the motion to disqualify plaintiff's law firm must be DENIED.

Defendant Ronald O. Perelman ("Perelman") in this action for breach of contract now moves to disqualify the law firm Susman Godfrey LLP ("Susman") as attorney for plaintiff Applehead Pictures LLC ("Applehead") on the grounds that Susman formerly and/or currently represents non party Ellen Barkin, a member of the plaintiff, arguing that Barkin's individual interests are in conflict with those of the corporate plaintiff in this lawsuit.

Plaintiff Applehead is a Delaware limited liability company whose members are defendant Perelman, and non-parties Ellen

Check One : FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Barkin and George Barkin, Perelman's now former wife and brother-in-law, respectively.

Plaintiff Applehead alleges that it formally retained Susman in June 2007 to commence an action to recover more than three million dollars in capital contributions that defendant Perelman has failed to make to Applehead in breach of its Amended Operating Agreement dated February 6, 2006. That Agreement designates defendant Perelman, Ellen Barkin and George Barkin, as Members A, B, and C, respectively. Article IV of the Operating Agreement provides-

MANAGEMENT

The management of the Company is fully reserved to Member B and Member C, and the Company shall not have "managers," as that term is used in the [Delaware Limited Liability Company] Act. The powers of the Company shall be exercised by or under the authority of, and the business and affairs of the Company shall be managed under the direction of, Member B and Member C, who shall make all decisions and take all actions for the Company. Decisions or actions taken by the Members in accordance with this Agreement shall constitute decisions or actions by the Company and shall be binding on the Company.

Defendant Perelman asserts that before filing the herein action, Susman affirmatively held itself out as representing Barkin in this contract dispute with defendant Perelman. Specifically, defendant refers to an electronic mail message sent to one Barry Schwartz, "Perelman's counsel" from Steve Susman, which states:

Barry: I have been trying to reach you by phone for several weeks. I represent Ellen Barkin who has some contractual disputes with Ron Perelman. I thought that you and I could

chat and maybe resolve them quickly. If you're not the right one for me to be talking to, who should I call.

As you probably know, I am spending much time in NY opening a Susman Godfrey office. It's been great fun. We should get together for breakfast or lunch one day soon.

Defendant also cites two news stories that report that Susman represents Barkin as well as Applehead.

Defendant Perelman contends that his defenses to this action assert that Barkin mismanaged and wrongfully diverted Applehead assets. He alleges that Barkin has, inter alia, improperly caused the corporate plaintiff to pay her brother \$250,000 in salary, with additional benefits although her brother performed no services for the plaintiff corporation, established a competing company to which were diverted opportunities that belonged to plaintiff corporation, improperly caused the corporate plaintiff to pay legal fees incurred by Barkin in her personal disputes with defendant Perelman. He argues that Susman's representation of Barkin places the firm in conflict with Applehead, which representation will adversely affect the interests of plaintiff corporation.

Susman contends that there is no ground for disqualifying the law firm because (1) the law firm represents only plaintiff corporation and not Ellen Barkin either as a Member or individually, (2) non party Barkin acted on behalf of plaintiff corporation in retaining the firm which she is authorized to do

under the Operating Agreement, and (3) the electronic mail message referencing "Ellen Barkin" was an informal communication.

Defendant cites the following two Disciplinary Rules as the bases for his application.

DR 5-109 (22 NYCRR § 1200.28) "Organization as Client" provides, in pertinent part, that:

A. When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

DR 5-105 (22 NYCRR § 1200.24) states in relevant part:

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests...

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interest...

C. In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the applications of the simultaneous representation and the advantages and risks involved.

"Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter. Disqualification motions, unfortunately, have also been used as a litigation tactic to gain strategic advantage over an adversary." Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 131-132 (1996).

This court finds that defendant has not demonstrated that Susman ever represented non party Ellen Barkin, much less simultaneously represents plaintiff corporation and her in this action. Defendant's assertions of misfeasance and malefactions on the part of non-party Barkin would have to be interposed against her in his Answer; nonetheless, he appends no answer to his motion papers, much less a reply pleading showing any appearance by Susman on behalf of non party Barkin. The casual electronic communication made by the Susman lawyer to Barry Schwartz, identified only as "Perelman's counsel" and who is not associated with defense counsel, fails to establish an attorney client relationship between non party Ellen Barkin and Susman. Further, news reports about legal representation are merely hearsay evidence. Therefore, defendant has failed to make a prima facie showing of a conflict or of any apparent likelihood that counsel would be involved in representing differing interests since Susman affirms under penalty of perjury in accordance with DR 5-105, that he is the lawyer for

the organization and not for any of the constituents. See Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 AD2d 144 (1st Dept 2006). The facts on this motion are distinguishable from Horowitz v Horowitz, 151 AD2d 646 (2d Dept. 1989), where the attorney had represented the closely held corporation for more than ten years and was therefore disqualified from representing one of the two shareholders.

It is therefore,

ORDERED that defendant's motion to disqualify plaintiff's counsel Susman Godfrey LLP, is DENIED; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 18, 2008, 9:30 AM in IAS Part 59, 111 Centre Street, Room 659, New York, New York.

This is the decision and order of the court.

Dated: February 25, 2008

ENTER:

~~James A. ...~~
J.S.C.
DEBRA A. JAMES
J.S.C.
FILED
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