

Ship v King Biscuit Entertainment Group, Inc.

2008 NY Slip Op 31155(U)

April 16, 2008

Supreme Court, New York County

Docket Number: 0601533/2006

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

STEVEN SHIP,

Plaintiff,

- v -

KING BISCUIT ENTERTAINMENT GROUP, INC.,
BILL GRAHAM ARCHIVES, LLC d/b/a
WOLFGANG'S VAULT and KEVIN CAIN,
Defendants.

Index No.: 601533/06
Motion Date: 11/27/07
Motion Seq. No.: 007
Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this order to show cause to disqualify defendant's attorney

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

PAPERS NUMBERED	
_____	1
_____	2
_____	3

Cross-Motion: Yes No

Upon the foregoing papers,

FILED
APR 22 2008

NEW YORK
COUNTY CLERKS OFFICE

In this action, plaintiff Steven Ship (Ship) has filed a motion that defendant King Biscuit Entertain Group, Inc. ("King Biscuit") breached a contract for wages as well its fiduciary duty to him, as a shareholder. Plaintiff now moves to disqualify defendants' attorney John Rosenberg, Esq. (Rosenberg) and his law firm Rosenberg & Giger, P.C. from serving as trial counsel for defendants on the grounds that Rosenberg is a material witness to important issues in this case and that Rosenberg formerly represented plaintiff in matters substantially related to those at issue in this action. The motion must be denied.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check One : FINAL DISPOSITION NON-FINAL DISPOSITION

This lawsuit arises out of plaintiff's assertion of ownership rights in defendant King Biscuit and unpaid salary owed him when he served as president and ultimately CEO of King Biscuit. He alleges that defendant Kevin Cain ("Cain") is an equal equity partner in King Biscuit and owes plaintiff his proportionate share of net proceeds that defendant Cain received upon the sale of King Biscuit's assets.

Plaintiff contends that in 1996, Rosenberg undertook to represent him in connection with a copyright infringement action against a King Biscuit affiliate, in which plaintiff was personally named as a defendant. Plaintiff alleges that the copyright infringement action is related to affirmative defenses and the counterclaim that defendant King Biscuit interposed in the action at bar. He cites the part of King Biscuit's answer that asserts that plaintiff Ship's poor job performance subjected King Biscuit to exposure to and expenses incurred in defense of certain litigation.

Plaintiff alleges as a second basis for disqualification that Rosenberg is a material witness to important matters implicated in this lawsuit. He states that while advising him, Rosenberg gained personal knowledge of plaintiff's interest in King Biscuit, particularly in connection with an action brought by King Biscuit and plaintiff against a company called MMS Holding Corporation. Plaintiff alleges that upon Rosenberg's

advice, as part of a settlement of that action, plaintiff relinquished his stock in MMS in return for King Biscuit's purchase of certain MMS assets at a discount. He asserts that he followed Rosenberg's recommendation to forfeit his personal holdings, upon Rosenberg's advice that his interest in King Biscuit would increase in value as a result.

Plaintiff argues that Rosenberg's current law firm Rosenberg & Giger must be disqualified as well since Giger is a former associate of Sullivan & Worcester, the law firm at which Rosenberg was a partner at the time of his alleged representation of plaintiff.

Rosenberg, defendants' counsel, opposes the motion arguing that plaintiff has engaged in dilatory tactics and that his assertions are without basis. He argues that before bringing this motion, plaintiff waited sixteen months after commencement of his action and that plaintiff has consistently avoided discovery timetables. As for plaintiff's grounds for disqualification, Rosenberg denies that the copyright infringement litigation has any relationship to his client's defense in this case and avers that defendant seeks no relief with respect to that action that was settled many years ago. Furthermore, while disputing that Rosenberg is a material witness, Rosenberg also argues that there is no violation of the

witness-advocate rule because any testimony he offers would not be adverse to his client King Biscuit.

Plaintiff moves to disqualify Rosenberg pursuant to the Disciplinary Rules of the Code of Professional Responsibility DR4-101 (B) (22 NYCRR 1200.19 [b]) and DR5-108 (A) (22 NYCRR 1200.27) alleging that Rosenberg obtained confidential information from him as a result of his representation of the plaintiff in the copyright litigation and other matters.

DR5-108 (a), "Conflict of Interest; former client," provides that:

(a) Except as provided in section 1200.45(b) of this Part with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

(1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

(2) Use any confidences or secrets of the former client except as permitted by section 1200.19c of this Part, or when the confidence or secret has become generally known.

DR4-101 "Preservation of confidences and secrets of a client," provides:

(a) Confidence refers to information protected by the attorney-client privilege under applicable law, and secret refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under section 1200.19© of this Part, a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

- (2) use a confidence or secret of a client to the disadvantage of the client; and
- (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

The Court of Appeals has stated that

Under DR5-108 (A) (1), a party seeking disqualification of its adversary's lawyer must prove: (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 former client are materially adverse. Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification.

This rule of disqualification fully protects a client's secrets and confidences by preventing even the possibility that they will subsequently be used against the client in related litigation. This prophylactic measure thus frees clients from apprehension that information imparted in confidence might later be used to their detriment, which, in turn, fosters the open dialogue between lawyer and client that is deemed essential to effective representation.

By mandating disqualification irrespective of any actual detriment--that is, even when there may not, in fact, be any conflict of interest--the rule also avoids any suggestion of impropriety on the part of the attorney. This not only preserves the client's expectation of loyalty but also promotes public confidence in the integrity of the Bar. Finally, the bright line rule provides a clear test that is easy to apply, thereby allowing self-enforcement among members of the Bar.

Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 131 (1996)

(emphasis added, citations omitted).

The three factor test mandated by the Court of Appeals to be applied to motions to disqualify attorneys under DR5-108 is not to be applied mechanically, but requires "careful appraisal of the interests involved." Id. This is because

"[d]isqualification 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." Id., at 131-132.

Thus the first inquiry this court must make is whether plaintiff Ship is a "former client" of Rosenberg. Though he denies that defendants are seeking any relief related to the copyright infringement action, Rosenberg does not deny that he represented plaintiff in that action. He also confirms plaintiff's assertion that King Biscuit acquired the rights in a catalog of sound recordings from MMS Holding Corporation and that King Biscuit thereafter appointed plaintiff as president and ultimately co-Chief Executive Officer. Rosenberg then goes on to describe plaintiff's tenure in this offices as "notable principally for his incompetence and willful misconduct." .

However, in opposition to plaintiff's motion, defendant asserts that the copyright infringement litigation was commenced only three months before Ship resigned from King Biscuit and that upon his resignation, he ceased representing plaintiff, who retained new counsel. He avers that he, as counsel for the co-defendant, obtained plaintiff's release with respect to the dismissal of the action against all defendants, including

plaintiff. Rosenberg contends that though the copyright litigation is unrelated to action at bar in any event, his client has agreed that no discovery will be sought and that he seeks no relief in connection with the copyright litigation.

In determining whether plaintiff was a former client of Rosenberg for purposes of the Tekni-Plex test, one of the factors that this court must consider is whether plaintiff had a reasonable expectation that information it communicated to Rosenberg would remain confidential. "Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients." Tekni-Plex, 89 NY2d, at 137. Where there has been such prior joint representation a motion to disqualify counsel in subsequent proceedings between the parties will be denied. RAG American Coal Co. v Cyprus Amax Minerals Co., 299 AD2d 259 (1st Dept 2002); Meyers v Lipman, 284 AD2d 207 (1st Dept 2001).

This court's examination of plaintiff's assertion leads it to conclude that at least with respect to the copyright litigation, Rosenberg acted jointly as the attorney for both defendant King Biscuit and plaintiff. Rosenberg acted as counsel for plaintiff, who was a defendant in that action, but also as

counsel for an affiliate of defendant King Biscuit. Plaintiff, therefore, lacked a reasonable expectation that Rosenberg would keep facts gained during its representation from King Biscuit, since Rosenberg was at all times acting as counsel to King Biscuit, whose affiliate he represented in the lawsuit.

Plaintiff submits no proof that the representation was under anything other than a joint retainer agreement under which defendant King Biscuit paid Rosenberg attorneys fees for services provided on behalf of plaintiff and King Biscuit's affiliate. In the course of the copyright litigation that took place during plaintiff's tenure at King Biscuit, it is clear that the parties intended to share secret and confidential information. Indeed, plaintiff's position in this lawsuit is that defendants King Biscuit and Cain owed him a fiduciary duty, which duty has confidentiality as its hallmark. Therefore, even apart from the MMS Holding litigation, defendant King Biscuit and plaintiff were in relationship where they shared confidences, which they jointly shared with Rosenberg, corporate counsel to King Biscuit.

As to Rosenberg's representation of plaintiff in connection with the MMS Holding Corporation lawsuit, plaintiff's own assertions make clear that defendant King Biscuit and plaintiff were jointly represented by Rosenberg. In addition, upon becoming an employee of defendant King Biscuit, as a matter of law, Rosenberg represented defendant King Biscuit, the

corporation, but not plaintiff, an officer/employee of King Biscuit. Evans v Artek Systems Corporation, 715 F2d 788, 792 (2d Circuit 1983). Therefore, since before the settlement of the MMS Holding litigation plaintiff and defendant King Biscuit were jointly represented and after plaintiff's employment by King Biscuit, Rosenberg was no longer his attorney, plaintiff at no time had a reasonable expectation that information he communicated to Rosenberg would remain confidential.

Nor does the court find that plaintiff has sufficiently established the second part of the Tekni-Plex test since the copyright matter in which Rosenberg represented plaintiff is not substantially related to the matters at issue in the breach of contract action now before this court. The court looks to the counterclaims and affirmative defenses which defendant King Biscuit raises in its answer, and finds that based on the representations of Rosenberg and his client, the copyright claim is not substantially related. No evidence regarding that action will be discoverable. Nor will any such evidence be admissible at any trial.

While it is true that plaintiff and defendant King Biscuit have materially adverse interests in the current action, plaintiff's failure to demonstrate that the copyright action is materially related to the issues here or that any confidential information was disclosed to Rosenberg as a result of the MMS

litigation requires denial of plaintiff's motion to disqualify defense counsel.

Finally, Disciplinary Rules of the Code of Professional Responsibility DR5-102 (D) (22 NYCRR 1200.21) provides that:

If, after undertaking employment...in pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of his client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

Plaintiff asserts that he intends to call Rosenberg as a witness. However, plaintiff has not "identified [Rosenberg's] projected testimony and showed that it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant disqualification (citations omitted). Martinez v Suozzi, 186 AD2d 378 (1st Dept 1992). Even assuming plaintiff is successful at calling Rosenberg as a witness, Rosenberg insists that his personal knowledge is entirely consistent with his client's position in this lawsuit.

Plaintiff's motion for a protective order shall be denied as moot.

It is therefore,

ORDERED that plaintiff's motion to disqualify defendants' counsel John Rosenberg, Esq. and the law firm of Rosenberg & Giger, P.C. is DENIED; and it is further

ORDERED that plaintiff's motion for a protective order is DENIED; and it is further

ORDERED that the parties shall appear for a status conference in IAS Part 59 on May 13, 2008, 2:30 PM.

This is the decision and order of the court.

Dated: April 16, 2008

ENTER:

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

FILED
APR 22 2008
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