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

PRESENT: HON. RICHARD B. LOWE, III Justice PART 59

Carnegie Associates

INDEX NO. 606109/08

MOTION DATE 5/22/08

- v -

MOTION SEQ. NO. 001

Mitla Eric

MOTION CAL. NO.

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

FILED
AUG 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
AUG 28 2008
IAS MOTION SUPPORT OFFICE

Dated: 8/18/08

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 56

X

CARNEGIE ASSOCIATES LTD.,

Plaintiff,

INDEX NO. 600109/08

-against-

ERIC J. MILLER and
THE MILLER CONSULTING GROUP, INC.,

Defendants.

X

ERIC J. MILLER and
THE MILLER CONSULTING GROUP, INC.,

Counterclaim Plaintiffs,

-against-

CARNEGIE ASSOCIATES LTD.,
SHERWOOD SCHWARZ, and
KEVIN DALY,

Counterclaim Defendants.

X



**Hon. Richard B. Lowe, III:**

In this case, plaintiff/counterclaim defendant Carnegie Associates, Ltd. (Carnegie) alleges that defendants/counterclaim plaintiffs Eric J. Miller (Miller) and the Miller Consulting Group, Inc. (Miller Consulting) (collectively, defendants) diverted clients and commissions away from Carnegie, converted Carnegie's property, and incurred an unauthorized expense (Miller Aff., exhibit A). Defendants counterclaimed against Carnegie, Sherwood Schwarz (Schwarz) and Kevin Daly (Daly) alleging that they failed to distribute profits, repay loans, and release Miller's property (Miller Aff., exhibit B). Defendants now move to disqualify Michael S. Elkin, Esq.

(Elkin), and the law firm Winston & Strawn, LLP (Winston), who represent Carnegie, Schwarz and Daly.

**BACKGROUND**

In 2004, Miller, Schwarz, and Daly founded Carnegie, a closely held corporation providing insurance brokerage services (Miller Aff., ¶¶ 3, 11; Daly Aff., ¶ 3). In August 2004, Robert Stuchiner (Stuchiner) joined Carnegie as a fourth co-founder and employee (Daly Aff., ¶ 6; Miller Aff., exhibit D, at 4). Prior to forming Carnegie, Miller, Schwarz, and Daly each maintained his own insurance brokerage business, which continued to exist after Carnegie's formation (Daly Aff., ¶ 5; Miller Supp Aff., ¶ 3). Originally, Miller and Daly each owned 50% of Carnegie's shares and served as the company's president and vice-president, respectively (Daly Aff., ¶ 3). By January 2006, Miller and Daly sold their shares to Schwarz, resigned their officer positions, and continued to work as Carnegie's employees (Daly Aff., ¶ 4; Miller Aff., ¶ 15).

In 2005, Carnegie, having discovered that Stuchiner was allegedly diverting Carnegie's commissions to a competitor, terminated his employment (Daly Aff., ¶ 6; Miller Aff., ¶ 10). Carnegie then decided to commence a lawsuit against Stuchiner (the Stuchiner matter) (id.). The parties dispute whether it was Miller or Daly who found an attorney to litigate the Stuchiner matter. However, they do agree that Elkin and his former firm, Thelen Reid & Priest LLP (Thelen), were hired for this purpose (Daly Aff., ¶ 7, exhibit A; Miller Aff., ¶ 4; Miller Supp Aff., ¶ 4; Elkin Aff., ¶¶ 2-4). By way of a letter of representation, dated August 25, 2006, Elkin welcomed Carnegie as Thelen's new client, stating that Thelen would commence an action against Stuchiner on Carnegie's behalf (Miller Aff., exhibit E; Daly Aff., exhibit A). In August 2005, Carnegie filed a complaint against Stuchiner and others, alleging, among other averments,

that Stuchiner improperly diverted commissions, confidential information, and business away from Carnegie (Miller Aff., ¶ 4, exhibit C; Daly Aff., ¶ 6).

Miller claims that he worked closely with Elkin and Thelen on the Stuchiner matter: he discussed litigation and settlement strategy with Elkin; assisted with discovery; appeared at a mediation session; and testified at a deposition where he was represented by a Thelen associate (Miller Aff., ¶ 14; Miller Supp Aff., ¶¶ 7, 8).

In 2006, the Strang Cancer Prevention Center (Strang), a not-for-profit organization, was referred to Carnegie (Lipkin Aff., ¶ 4). Strang was considering raising funds by way of offering life insurance programs (id., ¶ 3). At a meeting with Strang attended by Miller, Schwarz, and Daly, Miller suggested a certain creative program, which Strang was interested in and asked him to develop further, and which ultimately became known as the SCION program (SCION) (id., ¶¶ 7-8; Miller Supp Aff., ¶ 14). The parties argue about whether SCION was Carnegie's or Miller's project (see Daly Aff., ¶ 10; Miller Aff., ¶ 18; Miller Supp Aff., ¶ 11). Miller contends that he made it clear to Schwarz and Daly that SCION was his project. Miller even hired a law firm, not Thelen, to file a provisional patent application for SCION with the U.S. Patent and Trademark Office (Miller Supp Aff., ¶¶ 20, 22, exhibit D).

The parties, however, do agree that Thelen's attorneys, with Elkin as a billing partner, worked on SCION (Miller Aff., ¶¶ 17-18; Daly Aff., ¶ 11; Elkin Aff., ¶ 8). Thelen and Miller never executed a retainer agreement with respect to SCION (Miller Aff., ¶ 18). Elkin contends that he billed Carnegie for Thelen's work on SCION (Elkin Aff., ¶ 9, exhibit B), and Daly claims that Carnegie paid Thelen, as part of Carnegie's "global settlement" with Thelen on a number of different unpaid invoices (Daly Aff., ¶ 11, exhibit B). Miller, in his turn, provides copies of e-

mail correspondence between him and Carnegie's in-house counsel, Sean Loughran, showing that Carnegie expected Miller to pay Thelen for work on SCION (Miller Supp Aff., ¶¶ 23-26, exhibits E, F, G). Miller also provides billing statements from Thelen Reid Brown Raysman & Steiner LLP, apparently a successor firm to Thelen, addressed to Miller's company, Miller Consulting, as well as a copy of a check from Miller Consulting, in the amount of $7,500, showing payment to Thelen, which Thelen apparently accepted in full satisfaction of the invoices (Miller Aff.,¶ 17, exhibits E, F).

In November 2006, Miller left Carnegie's employ (Miller Aff., ¶ 19). In January 2008, Carnegie filed the instant lawsuit, in which Carnegie is represented by Elkin and his new firm, Winston (Miller Aff., exhibit A). Schwarz and Daly, as counterclaim defendants, are also represented by Elkin and Winston.

## DISCUSSION

DR 5-108 provides that

> (a) . . . 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 1200.19 (c) of this Part, or when the confidence or secret has become generally known (22 NYCRR 1200.27 [a] [1] [2]).

Pursuant to DR 5-108 (a) (1), New York courts require that

> 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

(Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 131 [1996] [citing Solow v Grace & Co., 83 NY2d 303, 308 (1994)]; see also Falk v Chittenden, _NY2d_, 2008 NY Slip Op 05779, *3-4 [2008]). At the same time, courts must consider a civil litigant's fundamental right to counsel of its choice (see e.g. Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp., 32 AD3d 793 [1st Dept 2006]). Accordingly, an irrebuttable presumption of disqualification arises only if all of the aforementioned three criteria are satisfied (see Tekni-Plex, 89 NY2d at 131-132).

Here, the third criterion is met since the interests of Miller and Miller Consulting, as defendants/counterclaim plaintiffs, are materially adverse to Carnegie's, as plaintiff/counterclaim defendant. The issue then is whether the first two criteria are satisfied.

**Attorney-Client Relationship**

**A. Stuchiner Matter**

Defendants contend that an attorney-client relationship existed between Miller and Elkin with respect to the Stuchiner matter. Specifically, defendants maintain that Miller was Elkin's client in that action "for conflicts purposes," because Miller was then Carnegie's 50% shareholder and president and actively participated in the Stuchiner matter (defendants' mem, at 12). Additionally, Thelen's associate, reporting to Elkin, represented Miller personally at his deposition in the Stuchiner matter.

Carnegie, Schwarz, and Daly (collectively, Carnegie parties) contend that Thelen's associate did not represent Miller personally at the Stuchiner deposition, because Miller testified as Carnegie's corporate representative, and, in general, Thelen and Elkin represented Carnegie as a corporation, not Miller personally (Carnegie parties mem, at 14).

Generally, unless agreed otherwise, counsel for a corporation represents the corporation,

not its employees (see e.g. Talvy v American Red Cross in Greater N.Y., 205 AD2d 143, 149 [1st Dept 1994], affd for reasons stated 87 NY2d 826 [1995]; see also Polovy v Duncan, 269 AD2d 111, 112 [1st Dept 2000]). It is true, however, that particular circumstances, especially in the context of a closely held corporation, can give rise to fiduciary duties that an attorney of a corporation owes to its employees and shareholders (see e.g. Flores v Willard J. Price Assoc. LLC, 20 AD3d 343, 344-345 [1st Dept 2005] [attorney for a corporation owes duties of loyalty to the corporation's majority shareholder who is also its president]; see also Matter of Bowman Trading Co., 99 AD2d 459, 459 [1st Dept 1984] [where for over seven years attorney represented a corporation, co-owned by a husband and wife, attorney owes fiduciary duties to the husband and is disqualified from representing the wife in a proceeding against the husband, pertaining to the corporation's operation]). The court must consider the parties' actions to determine whether an attorney-client relationship existed between the corporation's attorney and its employees and shareholders (see e.g. Pellegrino v Oppenheimer & Co., Inc., 49 AD3d 94, 99 [1st Dept 2008]).

Here, although Carnegie is a closely held corporation, Elkin, by way of the August 25, 2005 letter of representation, made it clear that in the Stuchiner matter he and Thelen were representing only Carnegie (Miller Aff., exhibit E; Daly Aff., exhibit A). Whatever Miller contributed to the prosecution of the Stuchiner matter, he did so as Carnegie's corporate representative, and not in his individual capacity. Therefore, with respect to the Stuchiner matter, no attorney-client relationship existed between Miller and Elkin (see e.g. Polovy, 269 AD2d at 112).

**B. SCION**

Defendants maintain that an attorney-client relationship also existed between Miller or

Miller Consulting and Elkin or Thelen with respect to Thelen's work on SCION. Defendants point to the fact that Thelen Reid Brown Raysman & Steiner LLP billed Miller Consulting for its work on SCION and Miller Consulting paid Thelen.

The Carnegie parties dispute the existence of such an attorney-client relationship. Specifically, they point to the fact that no retainer agreement was executed between Miller or Miller Consulting and Thelen with respect to SCION. Carnegie parties maintain that SCION was a Carnegie project altogether. Thelen's attorneys billed Carnegie for their work on SCION (Elkin Aff., exhibit B), and Carnegie allegedly paid Thelen (Carnegie parties' mem, at 12). Carnegie parties urge the court to disregard Thelen Reid Brown Raysman & Steiner's invoices issued to Miller Consulting (Miller Aff., exhibit E) and the fact that Miller paid $7,500 (id., exhibit F), because those invoices were issued, and the payment made, after Elkin left Thelen (Carnegie parties' mem, at 13). At oral argument, the attorney for Carnegie parties contended that an alleged dispute among Carnegie co-founders over the ownership of SCION does not change the fact that, from Thelen's perspective, Carnegie was its client on SCION, not Miller (oral argument Transcript, at 12).

The existence of an attorney-client relationship does not depend on an explicit agreement or a payment of a fee (see Pellegrino, 49 AD3d at 99). A party, however, cannot create such a relationship based on its own subjective beliefs or actions, and the court must consider the actions of the parties (see id.). An important factor in this inquiry is whether a "law firm either affirmatively led [one] to believe it was acting on [his or her] behalf or knowingly allowed [one] to proceed under this misconception" (Jane St. Co. v Rosenberg and Estis, P.C., 192 AD2d 451, 451 [1st Dept 1993]).

Here, it appears that SCION was Miller's creation (Lipkin Aff., ¶¶ 7-8; Staunton Aff., ¶¶ 4, 6, 7). The main reason Thelen was hired to work on this project, in the first place, was Strang's recommending to Miller to use Douglas Allen, a trusts and estates attorney who happened to be of counsel to Thelen (see Lipkin Aff., ¶ 8; Staunton Aff., ¶ 5; Miller Supp Aff., ¶ 17). Carnegie's argument that no retainer agreement was signed is inapposite, because, in addition to the Stuchiner matter and SCION, Thelen worked on at least two other projects, and evidently no retainer agreements were executed with respect to those projects either (see Elkin Aff., exhibit B). Additionally, Miller informed Thelen's attorneys that SCION was his creation and their work on SCION was on his behalf, not Carnegie's (Miller Supp Aff., ¶ 19). Thelen's invoices demonstrate that Thelen attorneys working on SCION communicated only with Miller, not other Carnegie co-founders (Elkin Aff., exhibit B; Miller Aff., exhibit E). Miller discussed with Thelen's attorneys a possibility of patenting SCION in his own, or Miller Consulting's, name (Miller Supp Aff., ¶ 22; Lipkin Aff., ¶ 12). In November 2006, while Thelen's attorneys were still working on SCION, Miller Consulting did apply with the U.S. Patent and Trademark Office to patent SCION (Miller Supp Aff., exhibit D). That Miller claimed SCION as his own project is entirely consistent with Carnegie co-founders continuing to operate or maintain their individual businesses even after Carnegie's formation (Daly Aff., ¶ 5; Miller Aff., exhibit B, ¶ 84, exhibit D, ¶ 22; Miller Supp Aff., ¶ 3).

Whatever Elkin's involvement in the Stuchiner matter was, he clearly was able to glean from that case that there was a lot of confusion among Carnegie's founders, and very little in writing, as to who owned particular accounts or who was entitled to particular commissions. Therefore, although he was only a billing partner on SCION, Elkin should have clarified, if in fact

he did not, whether SCION was Carnegie's project or Miller's.

With respect to billing, one of Thelen's former attorneys claims that "SCION was a matter associated with and billed to Carnegie" (see Krieger Aff., ¶ 2). However, as correspondence between Miller and Carnegie demonstrates, Carnegie's in-house counsel, Sean Loughran, expected Thelen to bill Miller directly for work done on SCION (see Miller Supp Aff., exhibits E-G). Additionally, in November 2006, Strang informed Thelen, via Douglas Allan, that it should contact Miller with respect to payment for work on SCION (Lipkin Aff., ¶ 13). Finally, Thelen Reid Brown Raysman & Steiner LLP did issue an invoice to Miller and he settled the invoice, by paying $7,500, long before Carnegie's "global settlement" with Thelen (see Miller Aff., exhibits E-F; Daly Aff., exhibit B).

Therefore, the circumstances of this case demonstrate that Elkin and Thelen affirmatively led Miller to believe that they were acting on his behalf, or, at the very least, knowingly allowed him to proceed under this misconception (see Jane St. Co., 192 AD2d at 451). Consequently, with respect to SCION, an attorney-client relationship existed between Miller or Miller Consulting, on the one hand, and Elkin or Thelen, on the other.

**Substantially Related Matter**

Given that an attorney-client relationship existed only with respect to SCION, the court must determine whether Elkin's prior representation of Miller on SCION matters is "substantially related" to his current representation in this action (see e.g. Jamaica Pub. Serv. Co. v AIU Ins. Co., 92 NY2d 631, 636-637 [1998]).

The parties dispute whether SCION is part of this action. Defendants contend that it is, since Thelen and Elkin assisted Miller in his separate business, SCION, while Miller was still at

Carnegie, and now Elkin is suing Miller precisely because Miller engaged in such business (defendants' mem, at 15; see also reply mem, at 11). Carnegie parties, on the other hand, argue that SCION has no relationship to this action, because "SCION involved tax and estate planning advice with respect to a single life insurance product," whereas the present action pertains to Carnegie's commissions and property that Miller allegedly misappropriated (id. at 19; see also oral argument transcript, at 12-13).

The court has to look to Carnegie's complaint to determine the scope of this action. The complaint alleges that "Miller, without Carnegie's knowledge or consent, had been improperly utilizing Carnegie's resources and employees to conduct business for Miller's exclusive profit and divert current clients away from Carnegie to Miller and/or Miller Consulting," thereby "breach[ing] his duties of loyalty and good faith" and the covenant of good faith and fair dealing (complaint, ¶¶ 28, 37, 43b). The complaint also alleges that "Miller breached his fiduciary duties to Carnegie by . . . [u]surping business opportunities . . . that were in Carnegie's line of business, had been found in the course of doing business for Carnegie, and which Carnegie was capable of exploiting[, and] . . . [d]iverting current and prospective Carnegie clients to himself" (id., ¶ 47 [a], [c]). Additionally, "Miller and Miller Consulting . . . have intentionally and maliciously interfered to Carnegie's detriment with Carnegie's current and prospective business relations in that Defendants have . . . [d]iverted existing and new clients acquired during the course of Miller's employment with Carnegie from Carnegie to himself and/or Miller Consulting" (id., ¶ 50 [c]).

Clearly, SCION was one such business opportunity, which Miller encountered, and developed with Thelen's assistance, in the course of his employment at Carnegie and yet could be

charged with diverting for his own benefit. Therefore, the issue of Miller's diverting business opportunities from Carnegie, with SCION being one of them, is well within the scope of this action. Accordingly, Elkin's prior representation of Miller with respect to SCION is substantially related to his current representation in this action (see Tekni-Plex, 89 NY2d at 134-135).

Accordingly, under the circumstances, all three criteria – attorney-client relationship, substantial relatedness of representations, and adversity of interests – are satisfied, and an irrebuttable presumption of disqualification arises (see Tekni-Plex, 89 NY2d at 131-132). Therefore, Elkin is disqualified from representing Carnegie.

**Disqualification of Winston**

As to disqualification of Winston, pursuant to DR 5-105 (D), Carnegie parties are correct in that imputed disqualification does not create an irrebuttable presumption (see Kassis v Teacher's Ins. and Annuity Assn., 93 NY2d 611, 617 [1999]). First, the court must determine whether Elkin acquired confidential information with respect to SCION while at Thelen (see id.). Although Elkin claims that his role was limited to "opening the matter" and sending invoices to Carnegie (Elkin Aff., ¶¶ 8-9), defendants contend that Elkin attended meetings at Thelen where SCION was discussed (Miller Supp Aff., ¶ 18; Lipkin Aff., ¶ 10). Additionally, Thelen's own billing records indicate that on at least one occasion, Elkin participated in a telephone conference with respect to SCION (Elkin Aff., exhibit B). Accordingly, a reasonable possibility exists that Elkin did acquire confidential information with respect to SCION. Second, even assuming that Elkin received no material confidential information, Winston must still eliminate the appearance of impropriety by implementing screening measures to fully rebut the imputation of disqualification (see Kassis, 93 NY2d at 618). Not only did Winston fail to erect any screening

measures to separate Elkin from any involvement in this case, but it actually appointed Elkin as one of its attorneys in this matter. Therefore, Winston failed to rebut the imputed presumption of disqualification and is disqualified from representing Carnegie.

**Elkin and Winston's Representation of Schwarz and Daly**

Finally, defendants moved to disqualify Elkin and Winston from representing Schwarz and Daly. Defendants, however, failed to meet their burden in this respect, since they present no arguments as to whether any of the elements of disqualification is satisfied (see e.g. Pellegrino, 49 AD3d at 98 [the moving party has the burden of demonstrating that each factor of disqualification is met]). Additionally, on this record, the court sees no reason to disqualify Elkin and Winston. Specifically, the matters involved in SCION and the counterclaim action – which pertains to Carnegie's failure to distribute profits, repay loans, and release Miller's property – are not substantially related to each other (see e.g. Jamaica Pub. Service Co., 92 NY2d at 636-637). Therefore, Elkin and Winston are not disqualified from representing counterclaim defendants Schwarz and Daly.

**CONCLUSION**

Accordingly, it is hereby

**ORDERED** that the motion of defendants/counterclaim plaintiffs Eric J. Miller and The Miller Consulting Group, Inc., is granted only to the extent that Michael S. Elkin, Esq., and the law firm Winston & Strawn LLP are disqualified from representing Carnegie Associates Ltd., and is otherwise denied; and it is further

**ORDERED** that no further proceedings shall be taken in this action against plaintiff, without leave of court, until the expiration of 30 days after service upon plaintiff of a copy of this

decision and order, with notice of entry, which shall constitute notice to appoint another attorney pursuant to CPLR 321 (c).

Dated: August 18, 2008

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III