

Sotoloff v Tribeca Assoc., LLC

2008 NY Slip Op 32872(U)

October 17, 2008

Supreme Court, New York County

Docket Number: 112583/07

Judge: Barbara R. Kapnick

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

PRESENT: Hon. **BARBARA R. KAPNICK**

J.S.C.
Justice

PART 12

Peter Sotoloff

INDEX NO. 112583/07

- v -

MOTION DATE _____

TRIBECA ASSOCIATES

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED

OCT 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED: 10/17/08

Check one: FINAL DISPOSITION

[Signature]
BARBARA R. KAPNICK
NON-FINAL DISPOSITION
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
PETER SOTOLOFF,

Plaintiff,

- against -

TRIBECA ASSOCIATES, LLC, 330 HUDSON
ASSOCIATES, LLC, WILLIAM D. BRODSKY,
ELLIOTT S. INGERMAN and "JOHN DOE",
fictitious name, true name(s) unknown,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 112583/07
Motion Seq. No. 002

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

In an action to recover damages for breach of an employment contract, wrongful termination, conversion, bad faith and fraud, Peter Sotoloff ("Sotoloff" or "plaintiff"), now moves by Order to Show Cause, pursuant to 22 NYCRR § 1200.27 and Disciplinary Rule ("DR") 5-108, to disqualify the law firm of Greenberg Traurig, LLP ("the Greenberg Firm"), from further representing the defendants Tribeca Associates, LLC ("Tribeca"), 330 Hudson Associates, LLC ("330 Hudson"), William D. Brodsky ("Brodsky"), and Elliott S. Ingerman ("Ingerman"), due to a conflict of interest stemming from the Greenberg Firm's prior representation of Sotoloff in several legal transactions allegedly related to this action.

Alternatively, Sotoloff seeks an order, pursuant to 22 NYCRR §1200.21, DR 5-102, and 22 NYCRR § 1200.22, DR 5-103, disqualifying the Greenberg Firm upon the grounds that it may be called to testify as to the provisions in the employment agreement that is the subject of Sotoloff's lawsuit, and that two of its attorneys have a financial interest in the subject matter of this action.

Defendants oppose the motion and cross-move for an order, pursuant to 22 NYCRR § 130-1.1, imposing sanctions.

I. Conflict of Interest Based on Prior Representation (22 NYCRR § 1200.27 and DR 5-108).

It is well settled that

[t]he Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients. Rather, DR 5-108 sets out two prohibitions on attorney conduct relating to former clients. First, an attorney may not 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" (Code of Professional Responsibility DR 5-108[A][1] [22 NYCRR 1200.27(a)(1)]). Second, an attorney may not use "any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known" (Code of Professional Responsibility DR 5-108[A][2] [22 NYCRR 1200.27(a)(2)]).

A party seeking disqualification of its adversary's lawyer pursuant to DR 5-108(A)(1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only "where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise" (*Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 132, rearg. denied 89 N.Y.2d 917).

Jamaica Public Service Co. Ltd. v. AIU Ins. Co., 92 NY2d 631, 636 (1998).

"In order to meet the 'substantial relationship' test, the issues in the present litigation must be "identical to" or "essentially the same" as those in the prior case before disqualification will be granted." *Lightning Park v. Wise Lerman & Katz, P.C.*, 197 AD2d 52, 55 (1st Dep't 1994) (quoting *Dinger v. Gulino*, 661 F.Supp. 438, 444 (E.D.N.Y. 1987)).

From 2004 to 2007, Sotoloff was employed as a principal of Tribeca, a company owned by Ingerman and Brodsky. Pursuant to the employment agreement, and the Third (and final) Amendment effective December 14, 2006, plaintiff had a right to receive a base salary, a participation in Tribeca's fees and profits from real estate transactions, and was afforded an opportunity to invest personal funds in Tribeca's real estate projects.

Seeking disqualification, Sotoloff claims that the Greenberg Firm, and its predecessor Solomon and Weinberg LLP which merged into Greenberg, were his personal attorneys from 2004 to 2007 and represented him in several different legal transactions nearly all of which were "substantially related" to the matters at issue in this action.

Specifically, plaintiff claims that defendants' attorneys represented him in: a) negotiating and drafting the Third Amendment of the employment agreement with Tribeca; b) drafting and amending

operating and subscription agreements relative to certain of Tribeca's real estate projects; c) filing and incorporating corporations; d) setting up a self-directed IRA; and e) finalizing multiple sales of his membership interests in the properties located at 157 Chambers Street and 85 West Broadway, New York, New York.

In opposition, defendants contend that Sotoloff was represented by separate counsel, the Law Offices of David Lubin ("the Lubin Firm"), in connection with the negotiation and execution of his employment agreement and the Third Amendment, while the Greenberg Firm only represented Tribeca in connection thereto.

Sotoloff further claims that, during the negotiations of the Third Amendment, he spoke on more than one occasion with Ronald Weisenberg, Esq., an attorney with the Greenberg Firm, to discuss changes to the amendment and negotiate a compensation package. Mr. Weisenberg, however, denies that any such conversations ever took place.

In his reply papers, plaintiff has submitted an Affirmation from Mr. Lubin in which he represents that his firm

was retained by Peter Sotoloff to advise him in connection with his negotiations of the Third Amendment to his employment agreement, ... Greenberg Traurig, counsel to Tribeca Associates LLC, was responsible for drafting the Amendment. Although the associate at this

firm, who was handling this matter, is no longer employed by this firm, it is my recollection that Mr. Sotoloff had many direct conversations with the principals of Tribeca Associates and the attorneys at Greenberg Traurig who were responsible for this matter, without our knowledge or input.

Plaintiff's alleged conversations with a member of the Greenberg Firm even if they did occur, still do not establish legal representation. In fact, Sotoloff availed himself of Mr. Lubin's legal advice and representation throughout December 2006, when the Third Amendment was finalized and executed, as demonstrated by an e-mailed dated December 5, 2006, from an associate with the Lubin Firm to Mr. Weisenberg, providing comments on behalf of "our client," i.e., Sotoloff, to the Third Amendment draft proposed by Mr. Weisenberg on behalf of Tribeca. Even if Sotoloff did, in fact, negotiate some terms directly, it appears that he was not individually represented by the Greenberg Firm.

Sotoloff seems to argue in his reply that the Greenberg Firm actually may have drafted the amendment on behalf of both parties. However, there is no expectation of attorney-client confidentiality where a law firm represents an employee and his employer jointly. See *Talvy v. American Red Cross in Greater New York*, 205 A.D.2d 143 (1st Dep't 1994). In any event, the evidence shows that Sotoloff, a sophisticated investor, formally retained the Lubin Firm for the purpose of reviewing the Third Amendment, and had an opportunity to,

and did, receive legal advice from said law firm in connection with the execution of that document.

Defendants next contend that the Greenberg Firm represented only Tribeca and not Sotoloff in the drafting and execution of the operating agreements of Tribeca Chambers Holdings LLC and Tribeca West Broadway Holdings LLC, and the subscription agreement to purchase an interest in 85 West Broadway Holdings LLC. These entities were Tribeca's real estate projects in which Sotoloff was given the opportunity to invest, pursuant to his employment agreement. It is clear that the aforementioned documents were prepared by the Greenberg Firm on behalf of Tribeca so that Sotoloff, in addition to the other investors, could exercise his contractual right to purchase a membership interest in those entities. While the documents were not negotiable, Sotoloff was free to have his own counsel review them before electing to make the investments.

Moreover, Sotoloff has failed to show that during those transactions the Greenberg Firm could or did obtain privileged or confidential information about him which was different from the information that was known by Brodsky and Ingerman, as managing members of those entities, *i.e.*, that Sotoloff met a certain minimum income and net worth and was knowledgeable about that kind of investment. That information was required by the securities laws

to qualify as an investor in non-publicly traded partnerships or securities, and was included in the subscription agreement.¹

Defendants further contend that the Greenberg Firm did not provide legal advice when it referred Sotoloff, who wanted to incorporate two entities in Delaware, to an incorporation service called Triad, a wholly-owned subsidiary of the Greenberg Firm that does not provide legal services. The two Delaware entities - Romulus Capital Group LLC and De Novo Capital LLC - were formed as a routine service by non-lawyers. Defendants also argue that the Greenberg Firm did not provide either Sotoloff or the two corporations with any legal advice relating to these corporations even after they were formed. Moreover, Sotoloff has failed to allege any relationship between the formation of the corporations and the claims asserted in his Complaint, or that the Greenberg Firm acquired specific confidential information "substantially related" to those claims.

Next, defendants argue that the Greenberg Firm did not represent Sotoloff in setting up a self-directed IRA. Rather, Howard Shapiro, Esq., an attorney with the Greenberg Firm, referred plaintiff to a company which he had personally used and which

¹ The other information Sotoloff claims was confidential, such as the percentage of interest subscribed, the aggregate price, and Sotoloff's social security number, was also known at least by Brodsky and Ingerman.

allowed investments in private real estate companies. Mr. Shapiro denies discussing with plaintiff the advisability of him personally investing through a self-directed IRA. Even if informal discussions took place with Mr. Shapiro, Sotoloff has failed to show what information was or could have been provided by or to Mr. Shapiro that is "substantially related" to the claims in plaintiff's Complaint.

Defendants further contend that the Greenberg Firm provided only "*de minimis*" assistance to plaintiff as an employee of Tribeca in connection with his sale of portions of his membership interest in 157 Chambers Street and 85 West Broadway, and deny that this assistance involved matters "substantially related" to this action. In addition, defendants deny that the Firm had access to any of plaintiff's personal or confidential information.

Sotoloff, however, submits several e-mails which demonstrate that the Greenberg Firm prepared the agreements for the assignment of portions of Sotoloff's membership interest in the aforementioned entities to other investors. Here, again, Sotoloff has failed to satisfy the "substantial relationship" test as the assignments in which he claims the Greenberg Firm represented him are not at issue in this action. Moreover, the e-mails submitted by plaintiff show that Brodsky and Ingerman, as managing members of the holding companies, had to consent to those sales and approve the form of

assignment agreements used. Thus, Sotoloff has failed to show what privileged or confidential information was or could have been acquired by the Firm that was not known at least by Brodsky and Ingerman.

II. Advocate-Witness Rule (22 NYCRR §1200.21 and DR 5-102).

Plaintiff alternatively argues that the Greenberg Firm should be disqualified, pursuant to 22 NYCRR §1200.21 and DR 5-102, because its attorneys may be called as witnesses in this action to discuss the drafting, interpretation and meaning of the provisions in the Third Amendment of the employment agreement.

"The advocate-witness rule requires an attorney to withdraw from a case 'if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client.'" *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 74 (1st Dep't 2002) (quoting 22 NYCRR §1200.21[a] and DR 5-102 [a]). However, "such disqualification is required only where the testimony by the attorney is considered necessary." *Broadwhite Assoc. v. Truong*, 237 AD2d 162, 162-63 (1st Dep't 1997). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony,

and availability of other evidence." *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp*, 69 NY2d 437, 446 (1987).

At this juncture, there is no indication that testimony from any attorney with the Greenberg Firm will be strictly necessary because several other parties to the negotiation of the Third Amendment, including Ingerman, Sotoloff and the attorney at the Lubin Firm, can testify as to the parties' intent and as to the meaning of the contract should this Court find the language ambiguous. Thus, disqualification is not warranted on this ground.

III. Financial Interest in Subject Matter of Litigation (22 NYCRR §1200.22 and DR 5-103).

Finally, plaintiff argues that the Greenberg Firm should be disqualified pursuant to 22 NYCRR §1200.22 and DR 5-103, because it has a personal financial interest in the subject matter of this litigation. Specifically, plaintiff claims that: (a) Mr. Shapiro, and Craig Solomon, another attorney at the Firm, have a personal monetary interest and financial stake with respect to the property located at 85 West Broadway; (b) Mr. Solomon has invested personal monies and holds a financial stake in 157 Chambers Street, a property partially owned, managed and operated by plaintiff and the defendants; and (c) Mr. Solomon and Mr. Shapiro likely have invested personal monies in 330 Hudson Street, another property at issue in this action.

Defendants, however, contend that the interests held by the two attorneys in the three properties were acquired before plaintiff commenced this action, were disclosed and known to plaintiff at all relevant times, and are interests that will not be impacted by the results of this or any other pending litigation.

DR 5-103(A) prohibits a lawyer from acquiring "a proprietary interest in the cause of action or subject matter of litigation he [or she] is conducting for a client." Here, it is not clear whether the outcome of this litigation would affect the interests of Mr. Shapiro and Mr. Solomon. In any event, the Appellate Division, First Department has held that disqualification is not appropriate where "th[e] interest was acquired prior to the commencement of the client cases and has not been shown to conflict with the interests of the clients." *Sokolow, supra*, 299 A.D.2d at 76; *see also Biscione v. Carnevale*, 186 A.D.2d 942, 943-44 (3rd Dep't 1992). As it is undisputed that those interests predate the commencement of this action, this is not a valid ground for disqualification.

Accordingly, plaintiff's motion for disqualification of Greenberg Traurig, LLP, is denied. Defendants' cross-motion for sanctions is also denied, in the discretion of this Court.

This constitutes the decision and order of this Court.

Dated: October 17, 2008

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BARBARA R. KAPNICK
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