

**Square Foot Realty, LLC v Mordred Realty Corp.**

2008 NY Slip Op 32910(U)

October 20, 2008

Supreme Court, New York County

Docket Number: 601736/08

Judge: Walter B. Tolub

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

WALTER B. TOLUB

PRESENT:

PART 15

Index Number : 601736/2008

**SQUARE FOOT REALTY LLC**

VS.

**MORDRED REALTY CORP.**

SEQUENCE NUMBER : 001

DISQUALIFY COUNSEL

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

OCT 24 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: \_\_\_\_\_

10/20/08

*WBT*

**WALTER B. TOLUB** J.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  
COUNTY OF NEW YORK: IAS PART 15

-----x  
SQUARE FOOT REALTY, LLC

Plaintiff,

-against-

MORDRED REALTY CORP., and MICHAEL  
SOHAYEGH, SADRI GARAKANI a/k/a  
SADRI REZA GARAKANI a/k/a REZA  
GARAKANI and GALAHAD REALTY, CORP.,

Defendants.

-----x  
WALTER B. TOLUB, J.:

This is a motion by Plaintiff to disqualify Defendants' attorney, Lawrence Goodman, from representing the Defendants in this action. (DC 5-108; CPLR 4503[a]).

Facts

The underlying action was commenced for, inter alia, the collection of an unpaid real estate commission on the commercial property located at 715 9<sup>th</sup> Avenue, New York New York (the "Property"). The Property is owned by defendant Mordred Realty Corp.

Plaintiff claims that prior to retaining its current counsel, a principal of the Plaintiff, Aaron Gavios ("Mr. Gavios" or "Gavios"), was referred to Defendants' attorney, Lawrence Goodman ("Mr. Goodman" or "Goodman"). Mr. Gavios states that he contacted Mr. Goodman and discussed the case with him. Mr. Goodman then requested that Mr. Gavios forward copies of

Index No. 601736/08  
Mtn Seq. 001

**FILED**

OCT 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

[\* 3 ]

documents to him that would help prove Plaintiff's claims (Aff. Gavios). Plaintiff does not mention how many conversations he and Mr. Goodman had, any specifics about conversations or emails, how many documents were sent, what documents were sent or why they may be confidential. Plaintiff claims that such specific disclosures would be inappropriate as they would again reveal confidential information. Plaintiff further asserts that the contact between Mr. Goodman and himself establishes an attorney client relationship.

Mr. Goodman claims that in early 2007, he and Mr. Gavios contacted him and briefly explained that he believed that his company was entitled to a broker's commission for the Property. Mr. Gavios asked Mr. Goodman if he would represent the Plaintiff on a contingency basis. Mr. Goodman claims that he told Mr. Gavios that he first needed to meet with him and review the documents pertinent to his claim. The conversation ended with Mr. Gavios saying he that he would get back to Mr. Goodman.

After several months of not hearing from Mr. Gavios, Mr. Goodman claims that he left Gavios a telephone message inquiring into whether he was still interested in retaining Goodman to represent Plaintiff. Mr. Gavios responded by an email dated May 22, 2007 (Goodman Ex. A). The email states in pertinent part: "Sorry I have been taking so long to get back to you. I will try to put the documents together today and email them today."

(Id.). Then, by email dated May 27, 2007, Mr. Gavios provided Mr. Goodman with a copy of one letter. The letter was written by Time Equities, Inc., to Plaintiff and outlined a proposal on behalf of one of its clients to rent the Property ("Proposal Letter"). Mr. Goodman claims that this document was also forwarded to him by a principal of Mordred Realty for his review and consideration (Aff. Sohayegh). Mr. Goodman argues that the letter cannot be considered a confidential conveyance of information.

Mr. Goodman claims that by the time he received the Proposal Letter from Mr. Gavios, he had already met with and had several conversations with Defendants and had agreed to represent them in "unrelated lawsuits" involving the Property.

Mr. Goodman spoke to Mr. Gavios a second time at the end of May 2007, when he realized that Mr. Gavios' action and Defendants' action was related and advised Mr. Gavios of the conflict and that he would be unable to represent the Plaintiff. Mr. Goodman claims that Mr. Gavios stated that he understood and requested that he ask Defendants if they had any interest in settling the case. Mr. Gavios then sent Mr. Goodman an email dated May 31, 2007 of a counteroffer with Time Equities (Goodman Ex. C). Mr. Goodman passed on the information to the Defendants who stated that they were not interested in settling the matter. Mr. Gavios and Mr. Goodman spoke one last time in June of 2007 at

which time Mr. Goodman told Mr. Gaviros that the Defendants were not interested in settling the case.

Plaintiff now brings this motion to disqualify Mr. Goodman from representing the Defendants in this action based on a conflict of interest.

#### Discussion

DR 5-108 provides that a lawyer is prohibited from representing another person in the same or a substantially related matter in which a person's interests are materially adverse to the interests of a former client (DR 5-1081 22 NYCRR 1200.27).

A party attempting to disqualify an attorney under this rule 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 materially related; and (3) that the interest of the present client and former client are materially adverse (Tekni-Plex, Inc. v. Mayner & Landis, 89 NY2d 123, 131 [1996]). When the moving party is able to establish each of these elements, an irrebuttable presumption of disqualification follows (Id., at 132).

The irrebuttable presumption is imposed in order to safeguard client confidences and to free the former client of any apprehension that they will be used to his client's detriment in another matter and to avoid the appearance of impropriety on the

part of the attorney or the law firm (Solow v. Grace & Co., 83 NY2d 303, 309 [1994]).

In considering a motion for disqualification, the court must also balance the competing interests of the right to be represented by the counsel of one's choice and the other party's interest in having a trial free from the risk of disclosure of confidential information and the public's interest in the administration of justice (Tekni-Plex, Inc. v. Mayner & Landis, 89 NY2d 123, 131 [1996]; Nichols v. Village Voice, Inc., 99 Misc.2d 822 [Sup. Ct. NY Co. 1979]).

Here, the court must first determine whether an attorney client relationship existed between the Plaintiff and Mr. Goodman by considering the parties' actions (Pellegrino v. Oppenheimer & Co. Inc., 49 AD3d 94 [1<sup>st</sup> Dept 2008]). An attorney client relationship is established where there is an explicit undertaking to perform a specific task, and is not dependant on the payment of a fee or an explicit agreement (*See generally*, Jane Street Co. v. Rosenberg & Estis, 192 AD2d 451 [1<sup>st</sup> Dept 1993]; Wei Cheng Chang v. Pi, 288 AD2d 378 [2<sup>nd</sup> Dept 2001]). A party cannot create the relationship based on his or her own beliefs or actions (Jane Street Co. v. Rosenberg & Estis, 192 AD2d 451 [1<sup>st</sup> Dept 1993]).

In this case, Mr. Gavios expressed an interest to have Mr. Goodman represent Plaintiff in the underlying action in their

first telephone conference. However, Mr. Gavios does not provide any evidence that he received any legal advice or assistance from Mr. Goodman. Mr. Goodman asked for documents relating to the matter that would help him evaluate Plaintiff's case. All that Mr. Goodman received was a factual document, the Letter Proposal, which contains no confidential information. Mr. Goodman never received documents or information which could help him evaluate the merits of Plaintiff's claims. To counter Mr. Goodman's proofs, Mr. Gavios provides nothing but blanket statements that confidential information was turned over to Mr. Goodman, Mr. Gavios does not indicate that he relied on Mr. Goodman or his statements for representation purposes. In other words, Mr. Gavios provides nothing but his subjective belief that Mr. Goodman would represent him in this action. There are is no evidence of objective facts on which a reasonable person would rely as forming an attorney client relationship in this matter. It follows that no attorney client relationship existed between the Plaintiff and Mr. Goodman. Since Plaintiff is unable to prove the existence of such a relationship, the irrebuttable presumption of disqualification does not arise.

Without an attorney client relationship, in order to disqualify Mr. Goodman from representing the Defendants, Plaintiff must identify specific confidential information imparted to the attorney (Pellegrino v. Oppenheimer & Co. Inc.,

49 AD3d 94 [1<sup>st</sup> Dept 2008] *citing* Saftler v. Government Employees Insurance Co., 95 AD2d 54 [1<sup>st</sup> Dept 1983]). As stated above, Plaintiff points to no specific information imparted to Mr. Goodman, either during the initial consultation or otherwise, which could be considered confidential.

Under the specific facts of this case, in the absence of disclosure to Mr. Goodman of any confidential information, and in the absence of an unfair advantage to the Defendants, the harsh remedy of disqualification is not necessary and Plaintiff's motion is denied.

Accordingly, it is

ORDERED that Plaintiff's motion is denied in its entirety.

Counsel for the parties are directed to appear for a preliminary conference on November 21, 2008 at 11AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/24/08

**FILED**  
OCT 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
*W*  
HON. WALTER B. TOLUB, J.S.