

**Soekoro v Glazer**

2008 NY Slip Op 33156(U)

November 20, 2008

Supreme Court, New York County

Docket Number: 600676/08

Judge: Richard B. Lowe

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

PRESENT: **HON. RICHARD B. LOWE, III**

PART 54

Justice

Index Number : 600676/2008

**SOEKORO, PRAPANCHA**

vs.

**GLAZER, DAVID F.**

SEQUENCE NUMBER : # 003

DISQUALIFY COUNSEL

INDEX NO. 600676-08

MOTION DATE 11/20/08

MOTION SEQ. NO. #003

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

ere 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**

NOV 24 2008

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION IS DENIED IN ENTIRETY  
WITH ACCORDANCE TO THE COURT'S PREVIOUS DECISION

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

Dated: 11/20/08

**HON. RICHARD B. LOWE, III**

*[Signature]*

\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
PRAPANCHA SOEKORO, individually, and as a member  
of PASHAH LLC, and PASHAH LLC,

Index No. 600676/08

Plaintiffs,

-against-

DAVID F. GLAZER, TREVOR F. LEWIS, II,  
STEVE MOTTAGHI and AFSHIN MOTTAGHI,

Defendants.

**FILED**  
NOV 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Plaintiff Prapancha Soekoro ("Soekoro"), moves to disqualify the defendants' attorneys, Budd Larner, P.C. ("Larner") and A. Michael Corvino, Esq. , pursuant to DR 5-105(b), DR 5-108(a), and EC 5-18

**BACKGROUND**

The plaintiff and the defendants are managing members of Pashah LLC ("Pashah"), and each owns part of Pashah. Pashah is a hair salon, and it is a New York limited liability corporation. On March 2, 2007, the defendants terminated Soekoro's employment at Pashah. Soekoro alleges that he discovered that the defendants cheated on their tax and stole \$125,000 from Pashah. Soekoro claims that his termination was an attempt by the defendants to prevent him from further investigating this matter. Soekoro also alleges that the defendants took his client list and offered to return it to him only if he would sell his ownership interest in Pashah to the defendants. Soekoro then brought this suit. The defendants allege that Soekoro was involved in installing spyware into Pashah's computer system and acquired information that he was not authorized to obtain. The defendants state that Soekoro was terminated for this reason.

Soekoro brings this suit on behalf of himself and derivatively on behalf of Pashah against the defendants for attempting to interfere with the rights and interests of the plaintiff and Pashah. In moving to disqualify the defendants' attorneys, Soekoro alleges that Larner is currently representing both Pashah and the individual defendants. This alleged concurrent representation is a violation of DR 5-105 and EC 5-18. Soekoro further claims that even if Larner has ceased to represent Pashah, he had represented Pashah in the past and this is a violation of DR 5-108. Soekoro claims that Larner had previously drafted an asset purchase agreement and provided other forms of legal service for Pashah. Although Soekoro did not detail what the other legal services are, he contends that Pashah's general ledger shows that Pashah paid Larner in the past and therefore, Larner must have represented Pashah previously.

#### DISCUSSION

The disqualification of an attorney is a matter that rests in the sound discretion of the court (*Michaels v Zinger* 862 NYS2d 773, 775 [2008]). However, a party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted (*Id.*). The party seeking to disqualify a law firm or an attorney bears the burden on the motion (*Id.*).

Although it is usually recognized that a party to litigation may select an attorney of his or her choosing, this general right is not limitless (*Greene v Greene* 47 NY2d 447, 453 [1979]). The attorney may not accept employment in violation of a fiduciary relationship and may not allow his own interests to conflict with those of his client (*Id.*). To hold otherwise would be to ignore the overriding public interest in the integrity of our adversary system (*Id.*).

#### (DR 5-105) Conflict of interest: simultaneous representation

Soekoro alleges that Larner is concurrently representing Pashah and the defendants. He

argues that Larner's representation of Pashah and the defendants is a violation of DR 5-105. DR 5-105 prohibits attorneys from concurrent representation of multiple parties with conflicting interests. Since Pashah and the defendants are adversaries in this case, the plaintiff argues there is a conflict of interest.

A lawyer cannot simultaneously represent two opposing parties in the same litigation if the interest of each party conflicts. DR 5-105(b) states:

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 interests . . .

(Code of Professional Responsibility DR 5-105 [b] [22 NYCRR 1200.24 (b)])

Furthermore, this rule extends to law firms. DR 5-105(d) states:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so . . . .

(Code of Professional Responsibility DR 5-105 [d] [22 NYCRR 1200.24 (d)])

In addition, attorneys must avoid even the appearance of impropriety.

(1) A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

*(ii) there are no other circumstances in the particular representation that create an appearance of impropriety.*

(Code of Professional Responsibility DR 9-101 [b] [1] [ii] [22 NYCRR 1200.24 (b) (1) (ii)])  
(emphasis added)

In the present case, the plaintiff did not offer any proof that Larner is currently representing Pashah. The plaintiff has failed to establish that Larner is simultaneously representing both the plaintiff and the defendants. Their allegation is merely conclusory.

(*Jamaica Public Service Co. Ltd. v AIU Ins. Co.* 92 NY2d 631, 638 [1998]) (holding that in a motion to disqualify an attorney, the movant failed to meet his burden with just mere allegations). Therefore, this argument of the plaintiff fails.

*EC 5-18 - a lawyer employed or retained by a corporation*

Soekoro also alleges that if Larner is currently representing Pashah, there is also a violation of EC 5-18, since the defendants are members of Pashah and Pashah is a limited liability corporation.

It is established that when a corporation retains a lawyer, his or her allegiance is to the corporate entity, and not to its individual members, shareholders or employees. EC 5-18 of the Code of Professional Responsibility states:

*A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity . . . . A number of factors should be considered before undertaking a representation adverse to the affiliate of a client including, without limitation, the nature and extent of the relationship between the entities, the nature and extent of the relationship between the matters, and the reasonable understanding of the organizational client as to whether its affiliates fall within the scope of the representation.*

(Code of Professional Responsibility EC 5-18)

“Under the Code of Professional Responsibility, if a lawyer is retained by a corporation or similar entity, the lawyer owes allegiance to the entity and not to a shareholder, director or other person connected with it” (*Breslin Realty Development Corp. v Shaw* 2007 WL 2948585, \*5 [Sup Ct New York County 2007]). Hence, a lawyer may not represent a party whose interest in the litigation is adverse to the corporation that retains that lawyer.

As discussed above, the plaintiff does not offer any evidence that Larner currently represents Pashah. For the same reason that conclusory allegations are insufficient

(*Jamaica Public Service Co. Ltd. v AIU Ins. Co.* 92 NY2d 631, 638 [1998]), this part of the plaintiff's motion also fails.

Section 1200.27. [DR 5-108] Conflict of interest: former client

The plaintiff alleges that even if Larner's representation of Pashah has ended, the matters for which Larner previously represented Pashah and the matters for which Larner is presently representing the defendants have a substantial relationship. Pashah and the defendants in this case have adverse interests. DR 5-108 prohibits serial representation by attorneys of clients with adverse interests in matters that have a substantial relationship.

In support, the plaintiff offers as evidence to establish that Larner represented Pashah in the past: 1) Pashah's general ledger showing that Pashah made payments to Larner in 2005 and 2007; and 2) a 2007 asset purchase agreement that bears the initial "BL Draft 072307".

DR 5-108 governs when the opposing party of a litigation is the lawyer's previous client.

DR 5-108 states:

(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.

(b) Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by section 1200.19(b) of this Part that is material to the matter.

(Code of Professional Responsibility DR 5-105 [22 NYCRR 1200.27])

A party seeking disqualification of an opponent's lawyer is required to show: 1) that there was a prior attorney-client relationship; 2) that the matters involved in both representations are substantially related; and 3) that the present interests of the attorney's past and present clients are materially adverse (*Falk v. Chittenden* 11 NY3d 73, 78 [2008]). DR 5-108(a) mandates disqualification where these three conditions are met (*Id.*).

In the present case, the plaintiff presents evidence which may indicate that Larner had represented Pashah in the past. The Pashah general ledger shows that Pashah paid Larner in 2005 and 2007. This suggests that Larner represented Pashah before, and goes to satisfying the first prong of the *Falk's* test. However, the ledger does not indicate the matters for which Larner represented Pashah and whether they are related to those in the present litigation. Therefore, the plaintiff fails to establish the second prong of the *Falk's* test.

The plaintiff also offers Pashah's 2007 asset purchase agreement which bears the initials "BL." The plaintiff claims that this evidences Larner drafted the agreement as these are his initials. However, to say that the letters "BL" are Larner's initials is speculative. This cannot unequivocally establish that Larner drafted the asset purchase agreement. Consequently, without further investigation, the court cannot definitively rule that Larner's past representation of Pashah conflicts with his current representation of the defendants.

The plaintiff fails to establish with a clear showing that Larner had previously represented Pashah, but there are issues of facts raised in the instant motion. Therefore, further investigation is warranted and the court can order an evidentiary hearing. "Where material factual issues remain respecting an attorney's conduct or the propriety of disqualification, an

evidentiary hearing is in order” (*Matter of Beiny* 132 A.D.2d 190, 215 [1st Dept 1987]). The court will refer this motion to a referee to hear and impart with respect to the issues.

Advocate-witness Rule

The plaintiff fails in the moving brief to assert on what grounds Larner will be called as a witness in support of invoking the advocate-witness rule. This argument was brought up in the reply memorandum of law in further support of the motion to disqualify. “The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (*Dannasch v Bifulco* 184 AD2d 415, 417 [1992]). Since plaintiff brought up the advocate-witness rule argument for the first time in their reply papers, this argument will not be considered in deciding the motion.

However, in arguendo, even if this Court allows the plaintiff to bring up this advocate-witness rule argument, this rule is not automatic. An attorney is not disqualified simply because he or she will be called to be a witness. The court when considering the advocate-witness rule must balance several factors.

The advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority, for courts in determining whether a party's law firm . . . should be disqualified during litigation. *Courts must, in addition, consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation.*

(*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 440 [1987]) (emphasis added)

Furthermore, the testimony of the lawyer must be necessary, not just relevant or helpful.

Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary. 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.

(*id.* at 446)

In the present case, it is questionable if Larner's testimony is necessary, since the plaintiff's reason for calling Larner as a witness is based on plaintiff's allegation that Pashah paid Larner \$95,000, and the plaintiff reasons that this shows that the defendants are unfit to manage. However, this allegation is yet to be proven.

Even if the plaintiff can prove this allegation, it is unlikely that Larner's testimony is necessary since it will be likely that there are other witnesses that plaintiff can call on, i.e. other lawyers in the firm. The plaintiff's argument based on the advocate-witness rule fails.

*Delay to bring the motion to disqualify*

The defendants also contend that this motion is untimely because the plaintiff was aware of matters that might give rise to this conflict, but nevertheless failed to seek relief earlier. The defendants argue that the plaintiff is therefore barred from bringing this motion.

Although there is no bright line rule concerning when a delay will cause a motion to disqualify to be waived, a party's delay in seeking disqualification of adversary counsel is a factor to be considered.

Whether a motion to disqualify is waived depends on the diligence of the movant and the totality of the circumstances surrounding the litigation. Delay in making a motion to disqualify has been held to support a finding that it was brought in bad faith, to delay proceedings or to otherwise secure an advantage (*Eisenstadt v Eisenstadt* 723 NYS2d 395 [2d Dept 2001]) (ruling that the defendant waited over two years before moving to disqualify the plaintiff's attorney belies any genuine claim that he was prejudiced or that the motion was anything but an afterthought or dilatory tactic); (*Harnett v Long Island Jewish-Hillside Med. Ctr.*, 215 AD2d 726 [2d Dept

1995]) (ruling that the motion to disqualify came midway through trial and eight years after the commencement of the action clearly demonstrates tactical, rather than substantive motives); (*H.H.B.K. 45th St. Corp. v Stern*, 158 AD2d 395 [1st Dept 1990]) (ruling that there was a possibility that the motion to disqualify was made merely to secure tactical advantage over appellant is strongly suggested by the fact that it was made six months after the start of litigation and after respondents' two previous attorneys, who knew of basis of motion, did not seek disqualification); (*Lucci v Lucci*, 150 AD2d 650 [2d Dept 1989]) (holding that motion to disqualify made two years after commencement of the action is found to be made in bad faith).

In the present case, plaintiff admits that they knew of Larner's conflict of interest since the start of the litigation. However, the motion was filed two months from the start of this litigation, and the plaintiff did give notice through a letter to the defendant that they object to Larner being the defendants' counsel. Therefore, the plaintiff's motion is timely.

#### **Conclusion**

Therefore, based on the foregoing it is hereby

ORDERED that part of the motion seeking to disqualify defendants' counsel based on current representation of the corporation and the individual plaintiff, denied and it is further

ORDERED that part of the motion seeking to disqualify defendants' counsel based upon a prior representation of the corporation, is hereby referred to a Special Referee to hear and report or to determine if stipulated to by the parties and it is further

ORDERED the remainder of the motion is denied.

It is directed that a copy of this order with notice of entry be served upon the Motion Support Office (Room 119) and the Clerk of the Special Referee calendar is directed to set this

matter down for a hearing before a Special Referee.

This shall constitute the Order and Decision of the court.

Dated: November 20, 2008

ENTER:

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

**FILED**  
NOV 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK