

Hernandez v BBR Contr. Corp.

2009 NY Slip Op 30621(U)

March 13, 2009

Supreme Court, New York County

Docket Number: 104874/08

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC
Justice

PART 8

HERRNANDEZ, GERMAN
- v -
BBR CONTRACTING

INDEX NO. 104874/2008
MOTION DATE _____
MOTION SEQ. NO. 001
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

IS DECIDED IN ACCORD WITH THE ANNEXED MEMORANDUM.

FILED

MAR 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/13/2009

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARILYN SHAFER PART 8
Justice

GERMAN HERNANDEZ, GIOVANI MISAEL OROZCO,
 JAIRO ALVAREZ and JIMUER ROMERO OLVERA,

INDEX NO. 104874/08

Plaintiffs,

MOTION SEQ. NO. 001

-against-

BBR CONTRACTING CORP., NAVIGATOR'S
 INSURANCE COMPANY, WASHINGTON
 INTERNATIONAL INSURANCE COMPANY, AMERICAN
 MANUFACTURERS MUTUAL INSURANCE COMPANY,
 JOHN DOE BONDING COMPANIES 1 THROUGH 3 and
 EVANGELOS ARDAVANIS,

Defendants.

JULIO PRECIADO, RAFAEL RAMANO, PABLO BANDERAS
 MARTINEZ, JOFRE TOLEDO, SEVERINO HERNANDEZ and
 RAFAEL PEREZ,

INDEX NO. 600653/06

Plaintiffs,

MOTION SEQ. NO. 002

-against-

BBR CONTRACTING CORP., NAVIGATOR'S
 INSURANCE COMPANY, AMERICAN
 MANUFACTURERS MUTUAL INSURANCE COMPANY,
 JOHN DOE BONDING COMPANIES 1 THROUGH 3 and
 EVANGELOS ARDAVANIS,

Defendants.

The following papers, numbered 1 to 8, were read on this motion to disqualify counsel and cross-motion for consolidation in motion sequence 1:

PAPERS NUMBERED

Notice of Motion - Affirmation – Affidavit – Exhibits

1,2,3

Memorandum of Law in Support	4
Notice of Cross-Motion – Affirmation – Exhibits	5,6
Memorandum of Law in Support and in Opposition	7
Reply Affirmation	8

Cross-Motion: Yes No

The following papers, numbered 1 to10, were read on this motion to dismiss and to disqualify counsel and cross-motion to compel in motion sequence 2:

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affirmation – Affidavit – Exhibits	1,2,3
Memorandum of Law in Support	4
Notice of Cross-Motion – Affirmation – Exhibits	5,6
Memorandum of Law in Support and in Opposition	7
Affirmation in Opposition to Motion and Cross-Motion	8
Affirmation in Response	9
Reply Affirmation	10

Cross-Motion: Yes No

Upon the foregoing papers, the motions and cross-motions are decided as follows:

Introduction

The plaintiffs in these actions, initiated 2 years apart, bring claims for wage underpayment against the same employer. The motions and cross motions seek consolidation of the two actions and disqualification of plaintiffs’ attorneys, plus various procedural and discovery related relief.

Background

The plaintiffs in these actions worked for defendant contractor BBR Contracting Corp., a roofing and masonry contractor, on various public improvement projects. Public Works Contractors are required, pursuant to New York Labor Law § 220, to pay their workers the “prevailing rate of wages” and to provide them with “supplemental benefits” at the prevailing rate. This requirement is incorporated into public works contracts. In these actions, plaintiffs allege wrongful payroll practices, including underpayment of the prevailing rate of wage, against (1) BBR; (2) BBR’s bonding companies; and (3) BBR’s principal (collectively “BBR”).

In 2006, the lawfirm of Barnes, Iaccarino, Virginia, Ambinder & Shepherd instituted the action designated here as action 2 (the “Preciado action”) for *inter alia* breach of contract by BBR based upon its failure to compensate the plaintiffs at the prevailing rate and to provide supplemental benefits. Two years later, BIVAS moved to amend the complaint to add additional plaintiffs. BBR objected to the amendment and BIVAS initiated the action designated here as action 1 (the “Hernandez action”).

Disqualification

BBR moves to disqualify lawfirm BIVAS from its representation of the plaintiffs in both actions. In 2000, BIVAS, through its partner Lloyd Ambinder, represented BBR in connection with a wage underpayment claim against one of its subcontractors. BBR eventually issued paychecks directly to the subcontractor’s workers.

BBR’s principal, Evan Ardavanis, states that, in connection with this representation, Ambinder conducted an extensive investigation of the company’s operations and practices. He further alleges that BBR subsequently discussed other issues, including underpayment claims, with Ambinder. When he later sought to retain Ambinder to represent him in an underpayment action, Ambinder advised BBR he had stopped representing employers to avoid potential conflicts. He referred BBR to John Mastroietro,

an attorney with an office in BIVAS' suite. BBR discussed the matter at a meeting with Ambinder and Mastroietro.

BIVAS terms the disqualification motion a tactic to eliminate a firm experienced in prevailing wage litigation. His representation of BBR took place eight years ago and there was no need for him to investigate BBR's internal policies because BBR's employees were not involved in the action. He merely facilitated a settlement with the subcontractor's employees. Ambinder denies Ardivanis' allegations that he (1) spent a "considerable amount of time" interviewing BBR; (2) discussed any other matters with BBR; or (3) recommended Matropietro, who, he claims, was recommended by BBR's accountant. Finally, he claims the motion is untimely with respect to the Preciado action since it was brought after the action had been pending for two years.

Matropietro submits an affidavit which confirms that (1) he handled a single matter for BBR in 2005; (2) he never discussed the matter with anyone from the BIVAS firm; and (3) the referral was from BBR's accountant.

Ardavanis replies that BIVAS' intake process ranged far beyond the subject matter of the lawsuit. He describes specific discussions with Ambinder detailing BBR's labor and employment policies and procedures, including (1) the number of employees; (2) the method of payroll payment; (3) the maintenance of employee work records; and (4) BBR's ownership and assets. Moreover, BIVAS is currently acting as *escrow* agent for BBR. BBR's accountant denies that he recommended Matropietro.

Finally, BBR argues its motion is timely because it raised the conflict of interest issue with BIVAS at the initiation of the Preciado action, and is without prejudice because that action has languished.

Consolidation

BIVAS cross moves in the Hernandez action to consolidate the two cases since the claims arose

out of the same transactions and involve common questions of law and fact. Both sets of plaintiffs were employees of BBR on publicly funded projects, in some cases the same projects.

BBR opposes consolidation on the ground that certain claims by the Hernandez plaintiffs are time-barred.

Dismissal

BBR moves in the Preciado action to (1) dismiss the Complaint against two of the plaintiffs, Rafael Perez and Pablo Banderas Martinez, who discharged the BIVAS firm; and (2) strike the complaint for plaintiffs' failure to produce discovery.

BBR served combined discovery demands in August, 2006. In July, 2007, BIVAS served discovery demands. Prior thereto, two of the plaintiffs retained other counsel, David Hernandez and Associates.

In December, 2007, BBR advised BIVAS they were in default in responding to the discovery demands. In January, 2008, it served a "Demand for Resumption of Prosecution of Action for Note of Issue" as to these two individuals, which demand has never been answered. Plaintiffs responded to the discovery demands in February, 2008, and, the following month, advised BBR it no longer represented those individuals. Both the BIVAS firm and the Hernandez firm deny that they represent Perez and Martinez. BIVAS claims it delivered their files to Perez and Martinez and Hernandez denies receiving them. Both firms request permission to move, by order to show cause, to be relieved as counsel.

BIVAS cross-moves in the Preciado action to compel BBR to respond to its discovery demands. BBR replies it is unwilling to produce discovery to BIVAS in light of the conflict and requests its motion to dismiss the claims of Perez and Martinez, which is unopposed, be granted.

Discussion

Consolidation

CPLR § 602(a) provides:

When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts. (*Chinatown Apartments, Inc v New York City Transit Authority*, 100 AD2d 824 [1st Dept 1984])

This Court finds that consolidation of the two actions is appropriate since the two actions involve identical factual and legal issues and seek the same relief. Both actions are brought by employees of BBR involving claims for unpaid wages under Labor Law § 220. Most of the projects sued upon in the two actions are the same. The instant motions to disqualify, which raised identical issues of law and fact, were consolidated by the Court *sua sponte*.

BBR objects, without legal reference, to consolidation because the various plaintiffs' claims arose at different times, and certain claims are untimely against certain defendants. Consolidation has no effect upon the timeliness of the various claims or any other defense BBR has to the various claims.

Disqualification

Disciplinary Rule 5-108 of the Code of Professional Responsibility prohibits attorneys from representing a client when the interests of the client are in conflict with those of their former clients. A party attempting to disqualify an attorney under DR 5-108 must establish (1) the existence of a prior attorney-client relationship; (2) that the former and current representations are substantially related; and (3) that the former and current representations are adverse. (*Solow v WR Grace & Company*, 83 NY2d

303 [1994]) Satisfaction of these criteria by the moving party gives rise to an irrebuttable presumption of disqualification. (*id*) An irrebuttable presumption of disqualification is favored over a hearing because it avoids the danger that an inquiry may destroy the confidences sought to be protected. (*NCK Org v Bregman*, 542 F2d 128 [1976])

The irrebuttable presumption is employed to fully protect client confidences and secrets; to offer a clear test which is easy to administer and to avoid an appearance of impropriety on the part of the attorney or the law firm. (*Cardinale v Golinello*, 43 NY2d 288 [1977] Code of Professional Responsibility DR 4-101) When an attorney represents a party against a former client, the current client's interest in vigorous representation potentially threatens the former client's expectation of confidentiality. The rule is designed to free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation. (*Id*) The Code of Professional Responsibility thus imposes a continuing obligation on attorneys to protect their clients' confidences and secrets. Even after representation has concluded, a lawyer may not reveal information confided by a former client, or use such information to the disadvantage of the former client or the advantage of a third party. (Code of Professional Responsibility DR 4-101 [B] [22 NYCRR 1200.19 (b); DR 5-108 [A] [2] [22 NYCRR 1200.27 (a) (2)])

This rule of disqualification 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 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. (*Spectrum Sys Intl Corp v Chemical Bank*, 78 NY2d 371 [1991])

Moreover, an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests. (*Cardinale, supra*; Code of Professional Responsibility, Canon 9) By mandating disqualification irrespective of any actual detriment, the rule avoids any suggestion of impropriety on the

part of the attorney. (*Solow, supra; Cardinale, supra*)

The courts have also recognized, however, that there are significant competing interests inherent in attorney disqualification cases. Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice and restricts an attorney's ability to practice.

(*Denberg v Parker Chapin Flattau & Kimpl*, 82 NY2d 375 [1993]) It may cause a current client to face significant hardships when the chosen attorney is disqualified, depriving him of the specialized knowledge of counsel of choice and forcing the client to familiarize a new attorney with the matter.

Moreover it may be used as a litigation tactic. (*S & S Hotel Ventures Ltd Partnership v 777 S H Corp*, 69 NY2d 437[1987])

Thus, in assessing whether the moving party has met its burden of satisfying each of the three requirements for disqualification under DR 5-108, courts should avoid mechanical application of blanket rules. Only when the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise. (*Solow, supra*)

This Court finds that BBR has satisfied the three pronged inquiry and the BIVAS firm must be disqualified. It is undisputed that the BIVAS firm, through Ambinder, represented BBR on at least one matter concerning wage underpayment and that BBR consulted Ambinder on other related claims. Although there are significant credibility issues raised by the parties' conflicting versions of their relationship, BBR has come forward with specific details regarding its contacts with Ambinder and the confidences shared. BBR perceived Ambinder as its attorney with whom it had an on-going relationship. While it is true that Ambinder ultimately refused to represent BBR in a wage underpayment claim, he did so explicitly to avoid conflict situations, such as this one, arising from representation of both employers and employees.

Neither does Ambinder's claim of laches prevail. We find no authority for denying disqualification where an actual conflict exists absent an explicit consent or waiver. (*IIIIBK 45th Street*)

Corp v Stern, 158 AD2d 395 [1st Dept 1990]; *St Barnabas Hosp v New York City Health and Hospitals Corp*, 7 AD3d 83 [1st Dept 2004]) It cannot be said that BBR consented or waived its objection to BIVAS' representation of the plaintiffs by engaging in settlement negotiations. That the Preciado action was not actively litigated is confirmed by the parties' mutual allegations of dilatory conduct in the instant cross motions.

While this Court is not unmindful of the potential hardship posed to the plaintiffs by disqualification of the BIVAS firm, the law is clear that these concerns do not override the important ethical considerations which underlie the rule prohibiting an attorney from representation in conflict with a former client. (*Solow, supra*)

Dismissal as to Perez and Martinez

Both the BIVAS firm and the Hernandez firm deny that they represent Perez and Martinez. The Bivas firm alleges it gave their files to Perez and Martinez and the Hernandez firm denies ever receiving it. The lawfirms request to move, by order to show cause, to be relieved of representation is granted. BBR's motion to dismiss as against Perez and Martinez is denied without prejudice to renewal upon resolution of the orders to show cause.

We have considered the other arguments raised by the parties and find them without merit.

Accordingly, it is hereby

ORDERED that plaintiffs' cross-motion to consolidate the above-captioned actions is granted; and it is further

ORDERED that the consolidated action shall bear the Index No. 600653/06 and it shall bear the following caption:

**JULIO PRECIADO, RAFAEL RAMANO, PABLO BANDERAS
MARTINEZ, JOFRE TOLEDO, SEVERINO HERNANDEZ,
RAFAEL PEREZ, GERMAN HERNANDEZ, GIOVANI MISAEEL
OROZCO, JAIRO ALVAREZ and JIMUER ROMERO OLVERA,**

Plaintiffs,
-against-

**BBR CONTRACTING CORP., NAVIGATOR'S
INSURANCE COMPANY, AMERICAN
MANUFACTURERS MUTUAL INSURANCE COMPANY,
WASHINGTON INTERNATIONAL INSURANCE COMPANY,
JOHN DOE BONDING COMPANIES 1 THROUGH 3 and
EVANGELOS ARDAVANIS,**

Defendants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that defendants' motion to disqualify the lawfirm of Barnes, Iaccarino, Virginia, Ambinder & Shepherd is granted; and it is further

ORDERED that defendants' motion to dismiss the complaint as against Rafael Perez and Pablo Banderas Martinez is denied without prejudice; and it is further

ORDERED that the BIVAS lawfirm and the Hernandez lawfirm shall move, by Order to Show Cause, to be removed from representation of Rafael Perez and Pablo Banderas Martinez within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendants' motion and plaintiffs' cross-motion to compel discovery are denied

without prejudice.

This reflects the decision and order of this Court.

Dated: 3/17/09

MAURELYN SHAFER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION