

146 Chambers Owners, LLC v 148 Magnolia, LLC

2009 NY Slip Op 30790(U)

April 6, 2009

Supreme Court, New York County

Docket Number: 600288/2008

Judge: Jane S. Solomon

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

PRESENT: Jane S. Solomon
Justice

PART 55

146 Chambers Owners, LLC

INDEX NO. 600288/08

- v -

MOTION DATE _____

148 Magnolia, LLC et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to/for disqualify counsel.

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-9

Replying Affidavits _____

10

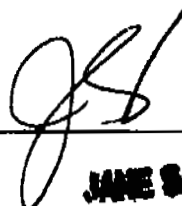
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and order.

WB 6-8-09 conferences at 11 AM set at end of hearing

FILED
APR 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4-6-09



JANE S. SOLOMON 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
COUNTY OF NEW YORK

-----X
146 CHAMBERS OWNERS, LLC,

Plaintiff,

148 MAGNOLIA, LLC, LOGEO ASSOCIATES,
LLC, TOJA ENTERPRISES, LLC, RYFI,
LLC, PUBLIC CONTRACTING NYC, INC.

Defendants.
-----X

INDEX NO. 600288/2008

DECISION AND ORDER

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NEW YORK

JANE S. SOLOMON, J.:

INTRODUCTION

In an action for property damage caused by a fire, defendant 148 Magnolia, LLC ("Magnolia") moves to disqualify the law firm of Weg and Myers, P.C. ("W&M") from continuing to represent plaintiff 146 Chambers Owners, LLC ("Chambers"). Chambers cross-moves for sanctions under NYCRR 130-1. For the reasons set forth below, Magnolia's motion is granted, and Chambers' cross-motion is denied.

FACTUAL BACKGROUND

Magnolia and Chambers are adjacent property owners. James Stockwell ("Stockwell") is a principal of Magnolia. On May 4, 2007, a fire that originated at Magnolia's building spread to Chambers' building. After the fire, Magnolia submitted a claim to its insurance company, and it was denied. According to Stockwell, he then sought legal representation for Magnolia and

consulted with W&M.

Stockwell claims that he met with two of W&M's attorneys, one of whom was Dennis T. D'Antonio ("D'Antonio"),¹ about retaining W&M to represent Magnolia. Stockwell states that he revealed the following confidential information: (a) "the facts and circumstances surrounding our claim against our insurance company"; (b) "possible theories and strategies that might be available [regarding] our claim against our insurance company"; (c) "the possibility of our being sued by third-parties damaged as a result of the fire"; and (d) "possible defenses to any suit against us by third-parties damaged as a result of the fire."

Stockwell asserts that, after he met with D'Antonio, he delivered various documents to W&M. He also avers that Cynthia M. Rexach, W&M's office manager, sent him a retainer agreement and advised him that W&M had drafted a letter to be sent to the attorney representing Magnolia's insurance company. The letter was about an examination under oath, which the insurance company was demanding. Stockwell subsequently advised W&M that Magnolia had decided to retain another law firm to represent it.

D'Antonio submits an affirmation in opposition. He claims that he has no recollection of meeting with Stockwell, but believes that a meeting took place because of a calender entry,

¹ Stockwell cannot remember the name of the other W&M attorney who was present at the meeting.

an intake form, and e-mails exchanged between Stockwell and Ms. Rexach. D'Antonio apparently did not take any notes during the meeting. Nevertheless, he claims that Magnolia was seeking representation only with respect to its insurance claim. He states that it is "highly unlikely" that he discussed Magnolia's potential liability to third-parties damaged by the fire and possible defenses to any third-party claims. (Affirmation of Dennis D'Antonio, ¶ 9.) His position is that he regularly has pre-retention meetings with potential clients, and his firm should not be disqualified from representing their adversaries where it is not retained after an initial conference.

Approximately seven months after the meeting with Stockwell, W&M filed a summons and verified complaint against Magnolia on behalf of Chambers, alleging that Magnolia is liable to Chambers for damages caused by the fire. The instant motion and cross-motion then followed.

DISCUSSION

Magnolia correctly argues that W&M should be disqualified from representing Chambers. Under the Code of Professional Responsibility,² an attorney is prohibited from "represent[ing] another person in the same or a substantially

² The Code has been repealed and replaced with the Rules of Professional Conduct (effective April 1, 2009).

related matter in which that person's interests are materially adverse to the interests of the former client." DR 5-108(a)(1). A lawyer also cannot, with certain exceptions, use "any confidences or secrets of the former client." DR 5-108(a)(2); DR 4-101. EC 4-1 provides: "Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer."

"A party attempting to disqualify an attorney under DR 5-108(a)(1) 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." Pellegrino v. Oppenheimer & Co., Inc., 49 A.D.3d 94, 98 (1st Dept. 2008) (quoting Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131 (1996)). An irrebuttable presumption of disqualification arises when the moving party establishes these three factors.

"The irrebuttable presumption is imposed in order to safeguard client confidences and 'to free the former client from any apprehension that' they will be used to the client's detriment in another matter." Pellegrino, 49 A.D.3d at 98 (quoting Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 309 (1994)).

The presumption also is in accordance with an attorney's ethical obligation to even "avoid an appearance of impropriety." Solow, 83 N.Y.2d at 308.

With respect to the first factor, it is "well established that the fiduciary relationship existing between lawyer and client extends to a preliminary consultation by a prospective client with a view toward retention of the lawyer, even where actual employment does not arise." Rose Ocko Foundation, Inc. v. Liebovitz, 155 A.D.2d 426, 427 (2nd Dept. 1989), quoted in Pellegrino, 49 A.D.3d at 99. Here, it is undisputed that Stockwell consulted with W&M with a view toward retaining it to represent Magnolia. Thus, the first factor is satisfied.

With regard to the second factor, contrary to Chambers' argument, the information Stockwell shared with W&M is substantially related to the claims asserted against Magnolia in this case. The consultation was about damages caused by the fire, and this lawsuit is also for damages arising therefrom. Chambers argues that the meeting was only about Magnolia's insurance claim, which is separate and distinct from the claims made against Magnolia by Chambers in this case.

However, according to Stockwell, the meeting was not solely confined to Magnolia's insurance claim. He asserts that he discussed potential claims that could be asserted against

Magnolia by third-parties due to the fire and possible defenses thereto. As noted, D'Antonio has no recollection of the meeting and cannot refute that this information was shared with him. His lack of recollection does not eliminate the ethical issues presented on this motion. Lastly, the third factor is satisfied because Chambers is suing Magnolia in this litigation.

The duty under DR 5-108(a)(2) and DR 4-101 not to disclose confidential information is "broader than the attorney-client privilege." Pellegrino, 49 A.D.3d at 98. As such, a party seeking disqualification need not show that confidential information will definitely be imparted; "a reasonable probability of disclosure" is sufficient. Id.

Magnolia has demonstrated a reasonable probability of disclosure in this action. Magnolia has established, through Stockwell's affidavit, that it shared confidential information with W&M. Given the substantial connection between that information and the issues presented in this case, Magnolia has shown a reasonable probability that said information will be disclosed. W&M argues that it cannot disclose that which D'Antonio does not remember. However, an attorney cannot avoid disqualification by simply stating that he does not recall hearing confidential information shared by a prospective client. See Seeley v. Seeley, 129 A.D.2d 625, 626-27 (2nd Dept. 1987).

Chambers argues that Stockwell's affidavit does not contain enough detail about the confidential information he shared with W&M. However, a party in Magnolia's position is not required to disclose the precise information it provided because "[s]uch a requirement would breach the very confidence sought to be protected." Liebovitz, 155 A.D.2d at 428; see also Nichols v. Village Voice, Inc., 99 Misc.2d 822, 824-25 (Sup. Ct. N.Y. Co. 1979); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). Further, "it is well settled that doubts as to the existence of a conflict of interest must be resolved in favor of disqualification." Liebovitz, 155 A.D.2d at 428.

Stockwell has described his meeting with W&M in sufficient detail and has identified information that is undoubtedly confidential in nature. A law firm simply cannot discuss potential claims and defenses with a party and then subsequently bring suit against it on behalf of an adversary. Chambers' cross-motion for sanctions is entirely without merit and is denied with \$100 costs.

CONCLUSION

Based on the foregoing, it hereby is

ORDERED that the motion to disqualify the law firm of Weg & Myers, P.C. from representing plaintiff is granted; and it further is

ORDERED that the cross-motion is denied, with \$100 in costs to abide the outcome of the case; and it further is

ORDERED that plaintiff shall have 45 days from the date of entry hereof to retain new counsel, which shall serve a notice of appearance on all counsel in this action and the related actions (111200/2007 and 101854/2008); and it further is

ORDERED that counsel for all parties in this action and the related actions shall appear for such preliminary or compliance conferences as may be appropriate on June 8, 2009 at 11:00 a.m.; the movant shall notify all parties and bring proof thereof.

Dated: April 6, 2009

ENTER:

[Handwritten Signature]

J.S.C.

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