

<b>GBC Prop., LLC v Scarano Architect, PLLC</b>
2009 NY Slip Op 32348(U)
October 7, 2009
Supreme Court, New York County
Docket Number: 112653/08
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN

PART 57

Justice

GBC Property, LLC

SCARANO ARCHITECT, PLLC

INDEX NO.

112653/08

MOTION DATE

MOTION SEQ. NO.

01

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 \_\_\_\_\_

Repeating Affidavits \_\_\_\_\_

Memos of Law M1,

PAPERS NUMBERED

**FILED**

OCT. 14 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is

~~The motion is determined pursuant to this Court's decision on the record on this date, a copy of the transcript of which shall promptly be presented by movant to the Court for so ordering~~

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

Dated: 10-7-09



MARCY S. FRIEDMAN 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

GBC PROPERTY, LLC,

*Plaintiff,*

- against -

SCARANO ARCHITECT, PLLC,

*Defendant.*

\_\_\_\_\_ x

Index No.: 112653/08

DECISION/ORDER

**FILED**  
OCT 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action, plaintiff GBC Property, LLC (“GBC”) seeks damages for breach of contract and architectural malpractice from defendant Scarano Architect, PLLC (“Scarano”). Plaintiff moves to disqualify defendant’s attorney, Zetlin & De Chiara, LLP (“Zetlin”).

Plaintiff seeks disqualification on the ground that Zetlin’s representation of Scarano is prohibited because the current matter is substantially related to a prior matter in which Zetlin represented plaintiff and because Scarano’s interests are materially adverse to plaintiff’s. Plaintiff also claims that while Zetlin was still representing plaintiff, it improperly represented Scarano.

The Code of Professional Responsibility was superseded by the New York Rules of Professional Conduct, which became effective on April 1, 2009, after service of plaintiff’s motion but before the return date. The motion was brought pursuant to Disciplinary Rules 5-108 (conflicts with former clients) and 5-105 (conflicts with current clients) of the former Code. The analogous new Rules 1.9 (former clients) and 1.7 (current clients) are substantially identical in relevant respects to the Code provisions. The outcome is the same under both.

Rule 1.9(a) provides: “A lawyer who has formerly represented a client in a matter shall not 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 unless the former client gives informed consent, confirmed in writing.” As this Rule reflects, “[a]ttorneys owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship. It is this duty that provides the foundation for the well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter.” (Kassis v Teacher’s Ins. & Annuity Assn., 93 NY2d 611, 615-616 [1999].)

While the disciplinary rules “prohibit attorneys who have represented the former client in a matter from switching sides and impute one attorney’s personal conflicts of interest to his or her current firm, they do not establish a mandatory disqualification rule.” (Id. at 617 [internal citations omitted].) Disqualification has a significant impact on the rights of litigants and may deny them the right to representation of their choice. (S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 443 [1987].) As the Court of Appeals has recognized, disqualification motions have “been used as a litigation tactic to gain strategic advantage over an adversary.” (Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 131-132 [1996], rearg denied 89 NY2d 917, citing S&S Hotel Ventures, 69 NY2d at 443.) The conflict rules therefore should not be “mechanically applied when disqualification is raised in litigation.” (Kassis, 93 NY2d at 617, quoting S&S Hotel Ventures, 69 NY2d at 444.)

Applying these principles, the court finds that disqualification is not warranted. Plaintiff fails to show that Zetlin previously represented plaintiff or that the current and prior representations are substantially related. In the prior representation, which occurred in 2005,

Zetlin represented Matthew Blesso, the principal of Lenox Condos, LLC (“Lenox”), in the negotiation of a construction management agreement with an entity named Vertical Design Construction Corp. for a renovation project at 140 West 124<sup>th</sup> Street. (See Retainer, Ex. B to Blesso Aff. In Support.)<sup>1</sup> The current matter is brought by a different entity, GBC. Matthew Blesso, who identifies himself as the sole member of GBC, is also the managing member of the entity that was involved in the 124<sup>th</sup> Street project; but, as Blesso acknowledges, GBC and that entity, Lenox, are “unrelated.” (Blesso Aff., ¶¶1-4.) Moreover, the current matter involves a different project at a different location – 234 West 20<sup>th</sup> Street.

Nor is this a case in which disqualification is warranted on the independent ground that Zetlin acquired confidential information in the course of the prior representation (see Rule 1.9[b][2], 1.9 [c] [formerly DR 5-108[A][2]], and that there is a “reasonable probability of disclosure” of such information in the current representation. (See Jamaica Pub. Serv. Co. Ltd. v AIU Ins. Co., 92 NY2d 631, 637 [1998], quoting Greene v Greene, 47 NY2d 447, 453 [1979].) A party seeking disqualification based on disclosure to the attorney of confidential information “need not actually spell out the claimed secrets and confidences” (Jamaica Pub. Serv. Co., 92 NY2d at 638), but does have “the burden of identifying the specific confidential information imparted to the attorney.” (Muriel Siebert & Co. v Intuit Inc., 32 AD3d 284, 286 [1<sup>st</sup> Dept 2006][internal quotation marks omitted], affd 8 NY3d 506 [2007].) Plaintiff’s conclusory allegation that Mr. Blesso imparted confidential information to Zetlin in the course of the prior representation is plainly insufficient to meet this burden. (See Jamaica Public Serv. Co., 92

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<sup>1</sup>The retainer bears the date April 7, 2004 on the first page and April 7, 2005 on the second page. In opposition to the motion, a Zetlin partner with personal knowledge of the representation, states that the retainer was made in 2005 and that Zetlin provided the services during the period from April through July 2005. (Mellon Aff. In Opp., ¶ 6.) Plaintiff does not controvert this statement.

NY2d at 638; Andre v City of New York, 19 AD3d 340 [2d Dept 2005].)

The court is also unpersuaded by plaintiff's contention that Zetlin served a notice threatening legal action upon GBC while GBC was its client. A lawyer is precluded from representing a client if "the representation will involve the lawyer in representing differing interests." (Rule 1.7[a][1] [formerly DR 5-105[A]-[B].) The undisputed evidence shows that Zetlin ceased to represent Blesso in connection with the 124<sup>th</sup> Street project in 2005, and sent a demand letter (Ex. D to Blesso Aff. In Support) to Blesso Properties in July 2007 for payment for Scarano's services on that project. As indicated above, Zetlin's representation of Blesso on the project was limited to negotiation of a contract with an entity other than Scarano and, in any event, terminated years before the demand letter was sent.


Under these circumstances, Zetlin is not barred by a conflict of interest from representing Scarano.

It is accordingly hereby ORDERED that plaintiff's motion to disqualify defendant's attorney Zetlin & De Chiara, LLP is denied; and it is further

ORDERED that Zetlin's request for sanctions is denied in the discretion of the court.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 7, 2009

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
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NEW YORK