Sattler v Levy, Gold & Sattler, LLP
2010 NY Slip Op 30249(U)
January 26, 2010
Supreme Court, Nassau County
Docket Number: 008261/2005
Judge: Ira B. Warshawsky
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SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

JOHN SATTLER, CPA,

Plaintiff,

-against-

LEVY, GOLD & SATTLER, LLP, NORMAN LEVY, CPA and NORMAN GOLD, CPA,

Defendants.

INDEX NO.: 008261/2005
MOTION DATE: 01/25/2010
MOTION SEQUENCE: 016

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Counsel for John Sattler ("Plaintiff") has filed a motion with this Court, asking for the disqualification of the law firm of Levy & Schneps, P.C. (hereinafter "L&S"), counsel for Levy, Gold & Sattler ("Defendants"), and for the vacatur of all prior proceedings because such were allegedly tainted with ethical violations by counsel for Defendants. Counsel for Defendants has opposed disqualification and requested that the Court

impose sanctions on the Plaintiff and counsel pursuant to 22 NYCRR § 130-1.1(d).

Questions Presented

Whether the firm of Levy & Schneps, P.C., who represented the partnership and drafted the Partnership Agreement between the members of the accounting firm which Plaintiff and Defendants were partners in, should be disqualified from representing the Defendants, depends on if there was an attorney-client relationship between the Plaintiff and the law firm, and whether the former and current representations are both adverse and substantially related.

Whether the firm was in a position where it could have received information which its former client might reasonably have assumed the attorney would withhold from his present client, and whether the Plaintiff had a reasonable expectation of confidentiality.

Statement of Facts

In or about 1994, the Plaintiff, John Sattler, became an equal equity partner in the firm Levy, Cohen & Gold, which was a partnership engaged in the business of providing general accounting services to clients. Both parties agree that in or about the 1st day of May, 1997, a written Partnership Agreement was drafted for conducting the business of Levy, Cohen & Gold, LLP and the relations of the partners *inter se*. Both parties agree that L&S was involved in the preparation of this Partnership Agreement. The Plaintiff alleges that during his time at the partnership, the firm represented both the partnership and him individually with respect to advice and other personal matters over the years; however, Defendants deny such as being true, and Plaintiff cites to no specific representation.

Sometime in 2000, Alan Cohen, CPA withdrew as a partner from the firm and thereafter the remaining partners continued business under the name Levy, Gold, Sattler & Fein, LLP. Also, in or about June 2004, Robert Fein, CPA withdrew as a partner of the partnership and the partnership changed its name to Levy, Gold & Sattler, LLP. Following the withdrawal of Robert Fein, the firm continued to do as aforesaid to provide general accounting services in the County of Nassau. It is agreed by both sides that the partners at this time, the Defendants Norman Levy, CPA,

Norman Gold, CPA, and Plaintiff, John Sattler, CPA, continued the partnership as equal partners, with each owning an undivided one-third (1/3) interest in its business.

On December 7, 2004, Plaintiff, John Sattler, terminated his relationship with the partnership. After such, Plaintiff filed an action for the accounting of the assets of the partnership. The Court was asked to rule on the relevant issues of the case.

The Court ruled that (1) the Plaintiff was bound by a 2:1 payment for accounts, pursuant to provisions of the Partnership Agreement, and (2) ordered an accounting of the partnership's assets as of December 7, 2004, the date of Plaintiff's withdrawal from the firm. Following a three-day evidentiary hearing on the accounting, the Court-Appointed Referee issued his report which, in the opinion of the Plaintiff, was "overwhelmingly adverse" to his position. After the determination by the Referee, the Plaintiff moved to disqualify the attorney for Defendants and to vacate all prior proceedings, which are four years in the making, and which would include the Referee's finding which was affirmed by the Court.

Discussion

I. THE LAW FIRM L&S SHOULD NOT BE DISQUALIFIED FROM THE PRESENT CASE BECAUSE THERE WAS NEVER AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN IT AND THE PLAINTIFF.

The issue in this matter is whether the law firm of Levy & Schneps, P.C. should be disqualified from the present case because of its role in the drafting of a Partnership Agreement for a partnership that the Plaintiff and Defendants were part of. It is well established that a party seeking to disqualify an attorney or law firm on the ground of prior representation must establish (1) the existence of a prior attorney-client relationship, and (2) that the former and current representations are both adverse and substantially related. Talvy v. American Red Cross in Greater NY, 205 A.D.2d 143, 148 (1st Dept. 1994). Both prongs of the test must be met for there to be a need for disqualification. However, "before the substantial relationship test is even implicated, it must be shown that the attorney was in a position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client. Allegaert v. Perot, 564 F.2d 246, 250 (2nd Cir. 1977).

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In the case at bar, the Plaintiff was the member of an accounting partnership together with the Defendants. The law firm of L&S had drafted a Partnership Agreement for the firm, and, because of this, the Plaintiff claims that an attorney-client relationship was created between him individually, and the law firm. However, no evidence in the record, and in the case law, suggests that an attorney-client relationship is ever established between any single member of a partnership, and the law firm, when the law firm has represented the partnership in some way, unless the law firm assumed an affirmative duty to represent the person. Kushner v. Herman, 628 N.Y.S.2d 123 (2nd Dept. 1995); see also Quintel Corp. v. Citibank, 589 F.Supp. 1235, 1242 (S.D.N.Y. 1984). Also, where the lawyer or law firm represented two or more clients united in interest in a prior related matter, no reasonable expectation of confidentiality exists. Allegaert, 565 F.2d 246. Although the Plaintiff claims that L&S represented him in some way, the Defendants state that there is nothing in the files of L&S to show that he was ever represented individually or was a client of L&S. The parties to the case all shared an interest in common, mainly the advancement of the accounting firm, and, based on the law, neither of them ever established an attorney-client relationship individually with L&S. What is more, L&S has not assumed any affirmative duty to represent Mr. Sattler in any way. The Court understands that the present representation by L&S is adverse to that of Mr. Sattler, but the rule is clear, and for there to be a need for disqualification, both prongs of the test must be met; in this case there was never an attorney-client relationship between L&S and Mr. Sattler, and, therefore, the fact that the representation by L&S is adverse to him, does not warrant an order to disqualify because both prongs of the test have not been met.

Moreover, the Plaintiff states that in the context of L&S's representation of the partnership, the Plaintiff imparted to L&S confidential information. The law is also set on this issue, stating that a party seeking disqualification based on disclosure of confidential information "has the burden of identifying the specific confidential information imparted to the attorney." Muriel Siebert & Co. v. Intuit, Inc., 32 A.D.3d 284, 286 (1st Dept. 2006). Once again, the Plaintiff does not meet this burden, because it fails to identify any such information which it may have given to L&S.

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Additionally, since no attorney-client relationship had been established, and hence there was no prior representation for any individual member of the firm, there is no requirement to receive a waiver by the person as described under 22 NYCRR § 1200.27 (DR 5-108), and its newly amended version 22 NYCRR § 1200.9(a), which requires a waiver in writing when there was a prior attorney-client relationship.

Therefore, the motion by Plaintiff for the disqualification of L&S is denied, and the law firm L&S allowed to represent the Defendants in the case at bar. In addition, all proceedings up to this point shall remain as decided because there was no ethical infraction by the Defendants' counsel in its representation of the Defendants.

II. THE ATTORNEY FOR DEFENDANTS SHOULD ALSO NOT BE DISQUALIFIED UNDER THE DOCTRINE OF LACHES.

Laches is a final consideration that weighs against granting disqualification, and obviates the need for further analysis of conflict in loyalties. See St. Barnabas Hosp. v. N.Y. City Health & Hosp. Corp., 7 A.D.3d 83, 90 (1st Dept. 2004). The Court is aware that the current litigation has been going on for four years, and that prior counsel to Mr. Sattler was aware of a possible conflict which might have been present between Mr. Sattler and counsel for the defense; however, neither of the two attorneys who previously represented Mr. Sattler believed it to be an issue and never raised it to the Court for a decision. The Court is not of the opinion that proceedings up to this point should be nullified based on a possible conflict to which the Plaintiff acquiesced nearly four years ago; the current motion might even be seen as an attempt to delay the inevitable, paying for the judgment this Court awarded in favor of the Defendants.

When this case was in the conference stage, when Stanford Strenger, Esq. represented Plaintiff, the issue of conflict was raised, but Plaintiff's counsel intentionally chose not to follow up on it.

After the case was sent to the Referee who conducted a full hearing, the issue was raised before him, but no application was made to the Court for a ruling.

After the decision of the Referee was rendered, each side moved to either affirm or disaffirm the Referee's ruling. Plaintiff's counsel at that time (not current counsel) never raised the alleged conflict issue nor moved to disqualify Defendants' counsel.

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Mr. Legum, Mr. Sattler's present counsel, appears to have made a good faith request for disqualification, but only if he was without the knowledge of what prior counsel had done or not done on this issue.

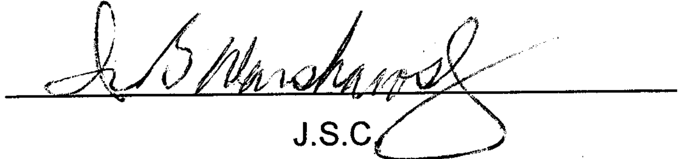
The current application is made so far into the litigation (post-final ruling of the Court) that it must also be denied based on laches. It is clearly one more attempt by Mr. Sattler to avoid the decision and judgment of the Court. While this matter was pending oral argument, the Plaintiff filed for bankruptcy (July 2009). This matter only reached oral argument and final decision after the bankruptcy judge sent it back to this Court pursuant to an order of December 23, 2009.

III. SANCTIONS.

Counsel for the Defendants has also made a request to the Court for the imposition of sanctions against the Plaintiff and his counsel under 22 NYCRR § 130-1.1. That request is denied. Despite the argument of defense counsel in its opposition and on the record of Mr. Sattler's actions, and his less than credible deposition statement related to his presence at the firm and the manner in which he departed, it does not amount to frivolous conduct requiring sanctions.

It is **SO ORDERED.**

Dated: January 26, 2010



J.S.C.

ENTERED

JAN 29 2010

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