

**Haberman v Zoning Bd. of Appeals of the City of
Long Beach**

2010 NY Slip Op 30266(U)

January 28, 2010

Supreme Court, Nassau County

Docket Number: 001138/04

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

X

SINCLAIR HABERMAN and BELAIR
BUILDING, LLC,

Petitioners-Plaintiffs,

-against-

Index No.: 001138/04
Motion Sequence...09
Motion Date...12/09/09

ZONING BOARD OF APPEALS OF THE CITY
OF LONG BEACH, ROCCO MORELLI, LENNY
TORRES, MARCEL WEBER, MICHAEL FINA,
STUART BANSCHICK, LORRAINE DIVONE,
MICHAEL LEONETTI, THE CITY OF LONG
BEACH, SCOTT KEMINS as Commissioner of
the Department of Buildings of the City of Long
Beach and XANDER CORP.,

Respondents-Defendants.

X

Papers Submitted:

- Order to Show Cause.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Memorandum of Law.....X

Upon the foregoing papers, the motion by the Petitioners-Plaintiffs to disqualify the law firm of Meyer, Suozzi, English & Klein, P.C. (Meyer, Suozzi) and their attorneys from representing the Respondents-Defendants, ZONING BOARD OF APPEALS OF THE CITY OF LONG BEACH, ROCCO MORELLI, LENNY TORRES, MARCEL

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WEBER, MICHAEL FINA, STUART BANSCHICK, LORRAINE DIVONE, MICHAEL LEONETTI, THE CITY OF LONG BEACH, SCOTT KEMINS as Commissioner of the Department of Buildings of the City of Long Beach in this matter, pursuant to 22 NYCRR 1200.19, 22 NYCRR 1200.27, and other ancillary relief, is decided as provided herein.

This action arises from a dispute between the parties with respect to the construction of a certain cooperative/condominium project on Shore Road in the City of Long Beach pursuant to a variance issued in 1985, subsequently amended in part, and thereafter confirmed in a Stipulation of Settlement dated March 8, 1989. The Petitioners-Plaintiffs seek, *inter alia*, a declaration of their right to proceed with construction of the project in accordance with the 1985 variance, plus damages and vacatur of the decision of the Zoning Board of Appeals, filed December 29, 2003, which revoked the building permit issued in connection with the project on the grounds that the decision was arbitrary, capricious and not supported by substantial evidence.

The construction of the project has been the subject of tortuous litigation dating back to the 1987 action captioned *Sinclair Haberman v The City of Long Beach, et al*, Index No.: 13391/87, wherein Sinclair Haberman sought, *inter alia*, to enjoin the City of Long Beach from enforcing new ordinance requirements detrimental to construction of the project in accordance with the 1985 variance.

The late Judge Bernard Meyer, of the law firm of Meyer, Suozzi, opposing counsel herein, was retained by Sinclair Haberman, as co-counsel with William Cohn of the

law firm of Cohn & Foley, to represent him in the 1987 action. Contending that opposing counsel's continued representation of the Respondents-Defendants in this matter is violative of Rule 1.9(a) of the Rules of Professional Conduct; 22 NYCRR 1200.19 (2009)¹, the Petitioners-Plaintiffs seek to disqualify the Meyer, Suozzi law firm. In this regard, the Petitioners-Plaintiffs note the existence of a prior attorney-client relationship between Sinclair Haberman and Meyer, Suozzi; a substantial relationship between this action and the 1987 action, which they contend arise out of the same operative facts; and the adverse interests of opposing counsel's former clients (Petitioners-Plaintiffs herein) and the Long Beach respondents, Meyer, Suozzi's present clients.

While the Petitioners-Plaintiffs urge that the subject matter of the instant litigation and that of the 1987 action are identical, and that the claims herein arise from the Stipulation of Settlement executed by the parties in the prior action, Meyer, Suozzi opposes disqualification asserting that Judge Meyer, who was retained in 1988 to research legal issues, was not the recipient of confidential information; the matters on which he was retained are not material to matters present in the instant action; and, even if alleged confidences material to the present action were conveyed to Judge Meyer, there is no

¹Rule 1.9(a) states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or 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."

Disciplinary Rule 5-108(A)(1) states that "a lawyer who has represented a client in a matter shall not, without consent of the former client after full disclosure . . . [t]hereafter 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 clients."

reasonable basis to conclude that any such purported confidences remain with the Meyer, Suozzi law firm.

The disqualification of an attorney is a matter that rests within the sound discretion of the court. *Calandriello v Calandriello*, 32 A.D.3d 450, 451 [2nd Dept. 2006]; *Zutler v Drivershield Corp.*, 15 A.D.3d 397 [2nd Dept. 2005]. In considering a motion to disqualify, the court is mindful that a party's right to be represented by counsel of his own choosing is a valued substantive interest which should not be interfered with absent a clear showing that disqualification is warranted. *Matter of Epstein*, 255 A.D.2d 582, 583 [2nd Dept. 1998]. As the Court of Appeals has observed, disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of litigants by denying a party the right to be represented by the attorney of his choice. *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 N.Y.2d 437, 443 [1987]. In considering a disqualification motion the court must closely examine the facts of the case and balance a party's right to counsel of choice against the need to maintain the highest standards of the legal profession.

The right to counsel of one's choice is not, however, absolute and may be overridden where necessary, for example, to protect a compelling public interest. *Tekni-Plex, Inc. v Meyer and Landis*, 89 N.Y.2d 123, 131 [1996]. Nevertheless, given that it is a valued right, any restrictions must be carefully scrutinized (*Lipschitz v Stein*, 65 A.D.3d 573, 576 [2nd Dept. 2009]), and the burden is on the movant to demonstrate facts establishing the

appropriateness of disqualification, i.e., 1) there was a prior attorney-client relationship; 2) the matters involved in both representations are substantially related; and 3) the present interests of the attorney's past and present clients are materially adverse. *Falk v Chittenden*, 11 N.Y.3d 73, 77-78 [2008]. Where the movant satisfies all three inquiries, an irrefutable presumption of disqualification arises. *Tekni-Plex, Inc. v Meyer and Landis, supra* at p. 132; *Pellegrino v Oppenheimer & Co., Inc.*, 49 A.D.3d 94, 98 [1st Dept. 2008].

All three criteria have been met here.

Rule 1.9(a) of the Rules of Professional Conduct; 22 NYCRR 1200.19 (2009), formerly Code of Professional Responsibility Disciplinary Rule 5-108, provides that attorneys 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 the interests of the former client, in the same or a substantially related matter. *Kassis v Teacher's Ins. and Annuity Ass'n.*, 93 N.Y.2d 611, 615-616 [1999]. While a presumption of disqualification is irrebuttable where the same attorney has represented a client in an earlier matter, and then attempts to represent another in a substantially related matter, where, as here, the attorney who handled the prior representation is no longer with the law firm, the remaining members of the firm are allowed to rebut the presumption of disqualification by establishing that the firm's remaining attorneys possess no confidences or secrets of the former client. *Solow v Grace & Co.*, 83

N.Y.2d 303, 313 [1994].

The prior attorney-client relationship between Meyer, Suozzi and Sinclair Haberman is undisputed. Notwithstanding Meyer, Suozzi's assertions to the contrary, the matters in issue in the prior action and in the present matter are substantially related. Significantly, it is the very terms of the Stipulation which settled the 1987 action that are presently at issue. Although Judge Meyer, who was retained as co-counsel subsequent to the lawsuit's commencement, is deceased and no longer with Meyer, Suozzi, both Jeffrey G. Stark and Brian M. Seltzer, who are specifically named in the retainer agreement, are presently partners at the law firm and Mr. Stark has specifically been retained as co-counsel in this matter. While Mr. Stark avers that neither he nor Brian Seltzer rendered a single minute of billable time on the 1987 action, it cannot be assumed that neither attorney performed any work on the file, engaged in any conversation/discussions regarding the matter, or was not privy to confidences exchanged in connection with the firm's representation of Mr. Haberman in the prior action. As the Petitioners-Plaintiffs point out, the essence of the instant action is to enforce rights pursuant to the very stipulation of settlement negotiated, reviewed and revised by Meyer, Suozzi for which Mr. Haberman was billed in excess of \$15,000.

Regardless of whether Meyer, Suozzi in fact obtained confidential information in connection with its former representation of the Petitioners-Plaintiffs, they are entitled to freedom from apprehension and to certainty that their interests will not be prejudiced as a

consequence of the law firm's representation of the Respondents-Defendants in this action. *Cardinale v Gollinello*, 43 N.Y.2d 288, 296 [1977]; *Columbus Const. Co., Inc. v Petrillo Builders Supply Corp.*, 20 A.D.3d 383, 384 [2nd Dept. 2005]. The proscription against taking a case against a former client is predicated on more than the possibility of use in the second representation of information obtained from the former client in the first representation. It is, therefore, not dispositive that no confidential information was obtained in connection with the first representation, or that an attorney who is no longer with the firm rendered the subject services. *Cardinale v Golinello*, *supra* at p. 295.

Accordingly, under the circumstances extant, the Petitioners-Plaintiffs have established the existence of a prior attorney client relationship with Meyer, Suozzi, that the matters involved in both representations are substantially related in that they concern the Petitioners- Plaintiffs' right to proceed with the project at issue herein, and that the interests of the Petitioners-Plaintiffs and the Respondents-Defendants are materially adverse. The motion, therefore, to disqualify the law firm of Meyer, Suozzi from further representing respondents in this matter is **GRANTED**.


All matters not decided herein are hereby denied.

This constitutes the decision and order of this court.

DATED: Mineola, New York
January 28, 2010

ENTERED

FEB 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE



Hon. Randy Sue Marber, J.S.C.