

Alizio v Perpignano

2010 NY Slip Op 30514(U)

March 15, 2010

Supreme Court, Nassau County

Docket Number: 19181/03

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ANTHONY ALIZIO, individually and as a
 General Partner in OCEANVIEW REALTY
 COMPANY, OCEANVIEW ASSOCIATES,
 OCEANVIEW II ASSOCIATES, HEASON
 GARDENS ASSOCIATES, BRIDGEVIEW II
 COMPANY, BRIDGEVIEW II ASSOCIATES
 and BRIDGEVIEW III ASSOCIATES,

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 19181/03

MOTION DATE: Jan. 11, 2010
Motion Sequence # 021

Plaintiff,
-against-

PETER ROBERT PERPIGNANO, LILLIAN
 EISENBERG, AS PERSONAL REPRESENTATIVE
 OF THE ESTATE OF IRVING EISENBERG,
 BERNICE EISENBERG, AS PERSONAL
 REPRESENTATIVE OF THE ESTATE OF
 LEONARD EISENBERG, JOSEPH ALIZIO,
 CHARLES TITONE, GREGORY RONAN,
 GODDARD, RONAN & DINEEN, LLP, OCEANVIEW
 REALTY COMPANY, OCEANVIEW ASSOCIATES,
 OCEANVIEW II ASSOCIATES, HEYSON
 GARDENS ASSOCIATES, BRIDGEVIEW II COMPANY,
 BRIDGEVIEW II ASSOCIATES and BRIDGEVIEW
 III ASSOCIATES, BRIDGEVIEW III HOUSING
 CORP. and MAYPORT HOUSING PARTNERSHIP,
 JOSEPH DINEEN, ANITA OTTON, AS PERSONAL
 REPRESENTATIVE OF THE ESTATE OF EDWARD
 T. OTTON and SHEILA LEIPSNER,

Defendants.

The following papers read on this motion:

| | |
|--------------------------------|----|
| Notice of Motion..... | X |
| Affirmation in Opposition..... | X |
| Reply Affidavit.... | X |
| Memorandum of Law..... | XX |

This motion, by defendant Joseph Alizio, for an order pursuant to Rule 1.7(a) of the Rules of Professional Conduct disqualifying Herrick Feinstein LLP (hereinafter “law firm”) from representing the defendants Ocean View Realty Company, Ocean View Associates, Ocean View II Associates, Heyson Gardens Associates, Bridgeview II Company, Bridgeview II Associates and Bridgeview III Associates in these consolidated actions, and for such other and further relief as the Court deems just, proper and equitable, is determined as hereinafter set forth.

The movant’s attorney avers that the law firm should be relieved as counsel to defendants Ocean View Realty Company, Ocean View Associates, Ocean View II Associates, Heyson Gardens Associates, Bridgeview II Company, Bridgeview II Associates and Bridgeview III Associates, (hereinafter referred to as “Partnerships”); that the only remaining General Partners of the Partnerships, the movant and Anthony Alizio, do not wish the law firm to continue their representation of the Partnerships; and that, in essence, because of the passage of time and the demise of the managing general partner, Irving Eisenberg, there is no authorized person from which the law firm takes instructions. He asserts that the law firm is also advocating a position in conflict with that of the Partnership. He further avers that in the winding down of the Partnerships, the closing statements disclose that a disbursement of funds was made to an entity known as Mayport Housing Partnership, which is represented by the law firm in an action in which the movant, Joseph Alizio, as a defendant, has cross-claimed to recover such payments as improper and that the defendants Perpignano and Eisenberg have breached their fiduciary duty by permitting those payments; and the law firm represents Mayport and the Partnerships and Eisenberg’s estate in conflict, where its motion to dismiss the claims of Joseph Alizio and Anthony Alizio relative to the Mayport payments. In anticipation of the opposition that there is no one authorized to speak for the Partnerships, counsel for the movant contends that this Court has previously rejected PJ Alizio’s attempt to attack Joseph Alizio’s standing to pursue claims on behalf of the Partnerships.

In opposition, counsel has provided a short factual background, noting that six

separate actions are involved, with more than twelve parties and it has been ongoing for at least six years. He explains that five general partners have died, and their respective heirs, under the Partnership agreements, inherit their respective interest, but do not become general partners. He also notes that, despite the movant's assertion, Anthony and Joseph Alizio are not the sole remaining general partners of the various partnerships; and that representation by this firm has been continuous through many court conferences, motions and various sources of personal information and insights of the occurrences that form the varied bases of the six actions, i.e., Irving Eisenberg, who passed away three years ago. He further asserts that this motion is, in fact, a "strategic maneuver" (Mollen affirmation, ¶8); that if Anthony and Joseph chose to act together, they could have relieved the law firm, and there would be no necessity for this motion; and in fact, there was a clear indication from the movant herein, at a court conference, that the law firm had not been relieved. He argues that the law firm has continued its representation with the approval of the holders of 75% of the economic interests of the Partnerships, noting that neither Joseph and Anthony have any more than 14 2/7% economic interest in any of the Partnerships. He contends that the Alizio brothers' failure to act together to agree on relieving the law firm for more than three years after Eisenberg's death acts as a waiver to make this motion. With respect to the assertion of Joseph Alizio, that the law firm is conflicted because it represents a newly-added partnership adverse to positions by Joseph and Anthony, counsel contends that those claims are time-barred; and that the law firm is not taking a position adverse to the interests of the Partnerships. Counsel further argues that, because the Alizio brothers do not agree on anything, the Partnerships would be without legal representation.

In reply, moving counsel avers that, notwithstanding the minimal size of the economic interests of Joseph Alizio and Anthony, they constitute a majority of the general partners of each of the Partnerships. He further avers that the law firm's assertion of a waiver theory makes no sense because the client has a right to terminate counsel; and that the law firm cannot name anyone from whom it takes instructions or to whom it reports. He asserts that the law firm's institutional knowledge cannot displace client choice and/or legal conflicts. He contends that the legal conflict exists at least on paper and the law firm has not refuted the lack of a claim against the newly-added Partnership; and that the Rules of Professional Conduct do not permit simultaneous representations. He further contends that, Joseph Alizio, as the duly-appointed wind-up partner, the Mayyport Housing Partnership (the newly-added party) or Bob Perpignano owed him money, and he disputes Mayport's purported lack of liability; and that this motion is brought on behalf of the Partnerships. Counsel argues the applicability of the law firm's cited case law.

DECISION

This disqualification motion presents particular concerns, i.e., “. . .balancing the appearance of impropriety with a party’s right to representation by counsel of choice and against a danger that such applications are tactical “derailment” weapons for strategic advantage in litigation (**S&S Hotel Ventures, Ltd. Partnership v 777 S.H. Corp.**, 69 NY2d 437, 443)” (**Jamaica Public Service Co., Ltd. v AIU Insurance Co.**, 92 NY2d 631, 684 NYS2d 459, 1998).

Herein, the attorney-client relationship in this six plus year-long litigation has been made more tortuous and complex by the demise of several of the central figures in these partnerships, made more complex, perhaps, by the simultaneous representation, by the law firm, of seven partnerships. One of the surviving general partners, Joseph Alizio, is admittedly, a minority interest holder in some of those Partnerships, but not a managing General partner. The percentage of ownership, however, is not a determinative factor of that partner’s powers, because it is the status of a general partner that provides that power or right (see, generally, Partnership Law, Article 8). Joseph Alizio’s status is enhanced by the July 2003 agreement which appointed him as the general partner for the purpose of winding up of the Partnerships. The law firm’s assertion that, because of the passage of time, Joseph Alizio has waived his right, or that laches prevents the making of this motion, is inapplicable herein. Initially, the Court notes that a great deal of time elapsed with various stays because of the deaths of so many parties. Additionally, a major component of the theory of laches is prejudice, and with the lack of any principal or partner or general partner’s affidavit in opposition herein, none has been shown. Moreover, it is troubling to this Court that, in essence, the law firm asserts that the partnerships are leaderless, because inasmuch as Joseph Alizio makes this motion, his status is somewhat questionable, in that if he had the power to discharge the law firm, then he would have done so without the necessity of this application. However, the Court must also note that no individual, nor any entity that is a party or partner has submitted any opposition, thereby supporting the movant’s argument that the law firm follows no direction protecting the Partnerships’ interests.

“Although the disqualification of an attorney is a matter which rests within the sound discretion of the trial court (see **Boyd v Trent**, 287 AD2d 475, 731 NYS2d 209), a party’s entitlement to be represented

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in ongoing litigation by counsel of its choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted (see S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 443, 515 NYS2d 735, 508 NE2d 647)". (emphasis supplied).

(Zutler v Drivershield Corp., 15 AD3d 397, 790 NYS2d 485, 2nd Dept., 2005). Missing from that Court formula and directive herein is the critical factor that it is not apparent to this Court what the "party's" wishes are.

Accordingly, the motion is **granted** contingent upon the strict compliance with this order. Movant shall serve a copy of this order upon all parties in all the actions that are joined or consolidated herein. Upon said service, the movant is directed to conduct such meeting and obtain formal authorization as is required and necessary under the applicable Partnership Agreements to retain new counsel. Said meeting shall be held no later than March 26, 2010 and retention of counsel shall be accomplished no later than April 12, 2010. Upon retention, Herrick Feinstein shall forthwith transfer its file to new counsel. Failure to retain new counsel as hereinabove directed will result in **denial** of this motion.

Dated

March 10


I.S.C.
ENTERED

MAR 08 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE