

Century Ambulance Serv., Inc. v Aquino

2010 NY Slip Op 31537(U)

June 14, 2010

Supreme Court, Nassau County

Docket Number: 013427-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**CENTURY AMBULANCE SERVICE, INC. and
DOMENICK MARINARO,**

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiffs,

**Index No: 013427-08
Motion Seq. Nos: 4 and 5
Submission Date: 5/21/10**

- against -

**ROBERT J. AQUINO a/k/a ROBERT J. AQUINO, JR.;
CAS ACQUISITION, LLC; CAS ACQUISITION I, LLC
d/b/a CENTURY AMBULANCE SERVICE; ABRAMS,
FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG,
FORMATO & EINIGER, LLP; MARK ZAFRIN, ESQ.;
BARBARA STEGUN PHAIR, ESQ.; PINNACLE HEALTH
CONSULTANTS, LLC; and ANDREW S. BLATT**

Defendants.

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The following papers have been read on the Order to Show Cause and Cross Motion:

- Order to Show Cause, Affidavit in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Notice of Cross Motion, Affidavit in Support and Exhibits.....X**
- Affirmation in Opposition to Cross Motion and Reply.....X**
- Defendants' Affirmation in Opposition to Cross Motion.....X**

This matter is before the Court for decision on 1) the Order to Show Cause filed by Defendant Robert J. Aquino a/k/a/ Robert J. Aquino, Jr. ("Aquino") on April 30, 2010, and 2) the Cross Motion filed by Plaintiffs Century Ambulance Service Inc. ("Century") and Domenick Marinaro ("Marinaro") on May 19, 2010, both of which were submitted on May 21, 2010. For the reasons set forth below, the Court denies the Order to Show Cause and

Cross Motion in their entirety.

BACKGROUND

A. Relief Sought

Defendants seek an Order 1) disqualifying Robert Jay Dinerstein, Esq. (“Dinerstein”) from representing Plaintiffs as counsel, on the grounds that he has an irreconcilable conflict of interest and will be a necessary witness at trial; 2) directing Plaintiff Marinaro to return the ambulance that he has allegedly taken; and 3) awarding Defendant damages in the form of a sanction for Plaintiff’s allegedly frivolous conduct.

Plaintiffs move for an Order 1) granting Plaintiffs partial summary judgment based on a determination that Defendants have materially breached the Asset Purchase Agreement and the Management Agreement; and 2) staying and enjoining the Defendants, pending the disposition of this action, from exercising dominion and control of Century Ambulance Service, Inc.’s ambulance and ambulance operating authority and/or operating ambulances or ambulances under the operating authority granted to Century Ambulance Service, Inc., and from exercising dominion and control over all books and records of Century Ambulance Service, Inc., CAS Acquisition, LLC, CAS Acquisition I, LLC or any other entity that maintained books and records of the operations of Century Ambulance Service, Inc. since July 12, 2007.

B. The Parties’ History

1. Prior Decision

The parties’ history is outlined in detail in a prior decision of the Court dated November 20, 2009 (“Prior Decision”) in which the Court ruled on Plaintiffs’ application for injunctive relief, which included Plaintiffs’ request for an Order directing the Defendants Aquino and CAS Acquisition, LLC and CAS Acquisition I, LLC d/b/a Century Ambulance Service (“CAS”) to cease and desist from: 1) exercising dominion and control over the assets of Century including, but not limited to, Century’s ambulance and ambulance operating authority; and 2) exercising control over Century’s ambulance and ambulance operations. In the Prior Decision, the Court denied Plaintiffs’ prior application for injunctive relief in its entirety. The Court incorporates that Prior Decision herein by reference.

As set forth in the Prior Decision, Marinaro is the owner of all of the issued and outstanding shares of Century, and has served as its sole director and only officer. Plaintiffs

filed an Amended Verified Complaint dated September 26, 2008 that contains thirteen (13) counts. The Complaint relates to Marinaro's transfer of his interest in Century to Aquino and CAS. In connection with that transfer, Marinaro and Century entered into an Asset Purchase Agreement ("Purchase Agreement") with CAS dated July 12, 2007. In addition, Century, Marinaro and CAS entered into a Management Agreement ("Management Agreement") on the same date. After execution of the Purchase and Management Agreements, but prior to Aquino obtaining the necessary agency approvals, Aquino operated Century through CAS, pursuant to the Management Agreement, which Aquino personally guaranteed. Plaintiffs alleged that, while managing the business during this transition phase, Defendants engaged in the wrongful acts and conduct described in the Complaint that, unless enjoined, would cause irreparable harm to Plaintiffs.

In the Prior Decision, the Court denied Plaintiffs' application for injunctive relief based on the Court's conclusions that 1) in light of the factual disputes regarding the reasons that the proposed sale did not close, Plaintiffs did not establish a likelihood of success on the merits; 2) in the absence of documentation supporting Plaintiffs' claim that there was a danger of revocation of their Operating Authorities, which they describe as Century's primary assets, Plaintiffs' injury was compensable by money damages and, therefore, injunctive relief was inappropriate; and 3) in light of the parties' conflicting positions as to why the transaction did not close, and most especially in light of the Court's conclusion that any harm to Plaintiffs could be redressed by money damages, the Court concluded that the equities did not balance in Plaintiffs' favor such that injunctive relief was warranted.

2. The Instant Order to Show Cause and Cross Motion

Defendants submit an Affidavit in Support of Aquino dated May 7, 2010 in which he affirms as follows:

Aquino submits that Marinaro, due to his dissatisfaction with the Court's adverse rulings in this matter and "apparently with his current attorney's connivance" (Aquino Aff. at ¶ 2), stole the ambulance ("Ambulance") that is the subject matter of this litigation and has engaged in harassment of Defendant CAS' employees.

Aquino affirms that CAS has already paid the sum of \$200,000 in connection with the sale at issue, which Dinerstein is holding in escrow pursuant to an Escrow Agreement executed

on July 12, 2007. The balance of the sale, totaling \$1.8 million, is due at closing. Dinerstein represented Marinaro, and CAS subsequently retained Dinerstein to perform the necessary work with applicable governmental agencies to effectuate the transfer (“Transfer”) of the Operating Authority under which the ambulance company at issue is operated.

Dinerstein initially represented Plaintiffs in this action but was substituted by Joel Spivak, Esq., allegedly upon Dinerstein’s realization that there was a conflict of interest. Aquino avers that Dinerstein previously advised Aquino that he (Dinerstein) had influence with the entity that makes recommendations to the Department of Health regarding approval of the Transfer. Based on Dinerstein’s claims, CAS retained Dinerstein to file the necessary Transfer documents. Aquino affirms, further, that on September 15, 2007, Dinerstein advised him that he needed certain information for the Transfer including 1) Aquino’s *curriculum vitae*, 2) a list and description of the vehicles that would be operated by the new identity, and 3) copies of the documents filed with the Secretary of State regarding CAS’ formation.

Aquino submits that, despite his request for this documentation, Dinerstein never intended to complete the Transfer process, as demonstrated by the conduct of Dinerstein and Marinaro in “raising tangential issues, in an attempt to stall this deal” (Aquino Aff. at ¶ 16). By way of example, Aquino affirms that 1) Marinaro “arbitrarily decided” (Aquino Aff. at ¶ 17) that CAS owed him \$5,000 in rent to house the operations of CAS, even though Aquino had the right to conduct CAS’ operations out of Parkway Hospital, where Aquino is a principal; 2) Marinaro claimed that Parkway Hospital, which was not a party to any relevant Agreement, owed Century \$95,000 for services that it had previously rendered; and 3) Dinerstein claimed that Aquino had not provided necessary proof of insurance for the Transfer, when it was Marinaro who was responsible for the insurance issues due to his having incorrectly described Century as a not-for profit business even though it was, in fact, a for-profit business.

Aquino also alleges that Marinaro improperly removed the Ambulance from a street in New York City, and provides a police report regarding that incident. Aquino affirms that no arrest has been made in connection with that matter.

Plaintiffs submit an Affidavit in Support of Marinaro dated May 18, 2010. Marinaro outlines the background of this litigation, which the Court set forth in its Prior Decision and will not reiterate here.

Marinero submits, *inter alia*, that 1) Defendants failed to apply for the Transfer in a timely manner; 2) from the time that Defendants began to manage Century's daily operations, Marinero has been "frozen out and totally excluded from any participation in the operation of Century" (Marinero Aff. at ¶ 95); 3) Defendants have not obtained the insurance required for the Transfer; and 4) Defendants have failed to compensate Marinero properly under the Management Agreement.

Dinerstein submits an Affirmation in Opposition dated May 20, 2010 in which he affirms, *inter alia*, that 1) Defendants were represented by the law firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP throughout the negotiations of the Asset Purchase and Management Agreements; 2) as reflected by Dinerstein's retainer letter dated September 11, 2007 (Ex. 2 to Dinerstein Aff.), CAS retained Dinerstein specifically to represent that entity in connection with applications to the appropriate authorities in connection with the Transfer; 3) while Dinerstein has extensive experience with Transfer issues, he never stated that he had influence with the applicable authorities; 4) his representation of Defendants in connection with the Transfer issues required no disclosure of any confidential information, as it consisted of a) advising the client what would be required, which is publicly available information, b) filling out standard forms, and c) providing the required data to the appropriate agencies; 5) the Management Agreement contained a waiver section, Section 8.17 titled "Waiver of Certain Conflicts," in which Defendants agreed that Dinerstein's representation of Defendants for the limited Transfer purposes would not disqualify him from representing Century in connection with any matter arising out of the transactions to which that Agreement referred; and 6) Defendants' claims that Plaintiffs improperly removed the Ambulance lack merit because Century remains the titled owner of the Ambulance.

In his Affirmation in Opposition, Defendants' counsel submits, *inter alia*, that 1) the submissions establish that Dinerstein would be a witness in this matter; and 2) Plaintiffs' cross motion seeks the same relief that the Court declined to grant in the Prior Decision and, therefore, is effectively a motion to renew and reargue, which the Court should deny.

C. The Parties' Positions

Defendants submit that Dinerstein should not be permitted to represent Plaintiffs because of his prior representation of CAS and because he is a necessary witness in this matter.

Defendants also request an Order directing the return of the Ambulance.

Plaintiffs submit that they have demonstrated a likelihood of success on the merits, irreparable injury without injunctive relief and a balancing of the equities in the favor and, therefore, that the Court should grant their request for injunctive relief.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Disqualification of Counsel

The Code of Professional Responsibility¹ §§ DR 5-102(C), 5-102(D) and 5-108(A) are applicable to the Court's analysis:

DR § 5-102(C) provides, in pertinent part:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns that or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal * * *

DR § 5-102(D) provides, in pertinent part:

If after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw acting

¹ The Court notes that as of April 1, 2009, the New York Code of Professional Responsibility has been replaced by the Rules of Professional Conduct. However, in the matter *sub judice*, the relevant events transpired prior to the effective date of the Rules of Professional Conduct, and accordingly it is the New York Code of Professional Responsibility which governs the matters herein raised. *See Estate of Naomi Goodman*, 2009 N.Y. Misc. LEXIS 2445 (Sup. Ct. Rockland Cty. 2009).

as an advocate before the tribunal.

DR § 5-108(A) provides, in pertinent part:

* * * a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) 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; 2) Use any confidences or secrets of the former client * * *

A party's right to be represented in ongoing litigation by counsel of his choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. *Campolongo v. Campolongo*, 2 A.D.3d 476 (2d Dept. 2003). The disqualification of an attorney is within the sound discretion of the trial court. *Nationscredit Financial Services Corp. v. Turcios*, 41 A.D.3d 802 (2d Dept. 2007); *Bentvena v. Edelman*, 47 A.D.3d 651 (2d Dept. 2008).

Where, as here, Defendants move to disqualify Plaintiffs' counsel pursuant to the "lawyer as witness rule" as embodied in DR § 5-102, disqualification is required only upon a showing that the testimony to be provided is "necessary." *Goldberger v. Eisner*, 21 A.D.3d 401 (2d Dept. 2005); *Broadwhite Associates v. Truong*, 237 A.D.2d 162 (1st Dept. 1997). In determining whether a lawyer is a necessary witness, the court should consider such factors as the significance of the matters, weight of the testimony, and availability of other evidence. *S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 446 (1987). The moving party must also demonstrate that the testimony may be prejudicial to the client. *Daniel Gale Assoc. v. George*, 8 A.D.3d 608, 609 (2d Dept 2004).

C. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*,

75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Abinanti v Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

D. Application of these Principles to the Instant Action

The Court concludes that disqualification of Dinerstein is not required in light of the Court's conclusion that 1) Dinerstein is not a necessary witness given that other individuals, including Marinaro, will be able to provide relevant testimony regarding the transactions surrounding the execution of the relevant Agreements; and 2) Dinerstein's representation of

Defendants was limited to issues related to the Transfer, and Defendants were represented by other, well-qualified counsel during the negotiation and execution of the relevant Agreements. The Court notes, further, that the Management Agreement contains a provision in which the Defendants waived the very conflict they now raise.

The Court further concludes that Plaintiffs have not demonstrated their right to injunctive relief. Given the factual disputes outlined at length in the Prior Decision, and the Court's analysis in the Prior Decision which is equally applicable to Plaintiffs' application here, the Court concludes that Plaintiffs have not demonstrated a likelihood of success on the merits, irreparable harm without injunctive relief or a balancing of the equities in their favor. These same factual disputes make summary judgment inappropriate.

Finally, the Court concludes that Defendants have not demonstrated that Plaintiffs have engaged in frivolous conduct, and denies Defendants' application for sanctions.

In light of the foregoing, the Court denies Defendants' Order to Show Cause and Plaintiffs' Cross Motion in their entirety.

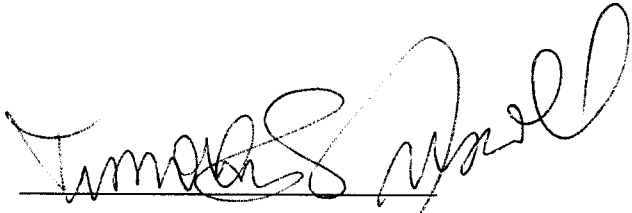
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on August 16, 2010.

ENTER

DATED: Mineola, NY
June 14, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 16 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**