

Melnick v Isneria Constr., Inc.

2010 NY Slip Op 31601(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 604163/07

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES

PART 59

Justice

HUGH MELNICK and LORI MELNICK,
Plaintiffs,

Index No.: 604163/07

-v-

Motion Date: 04/28/10

ISNERIA CONSTRUCTION, INC., FRANCESCO
BOVE PHILOMENA BOVE, ANTHONY BOVE,
RESOLUTION 4 ARCHITECTURE, ROBERT
LUNTZ, JOSEPH TANNEY,

Motion Seq. No.: 003

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 3 were read and an evidentiary hearing held on this order to show cause to disqualify David J. Pfeffer, as attorney for the plaintiffs

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1
FILED
3

Cross-Motion: Yes No

JUN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

In this action for breach of contract, defendant Resolution 4 Architecture ("Resolution 4") moves to disqualify plaintiffs' attorney David J. Pfeffer ("Pfeffer"), of Tarter Krinsky & Drogan, LLP, on the grounds that Pfeffer formerly represented defendant partnership Resolution 4 and its principals, architects Robert Luntz and Joseph Tanney, in matters substantially related and materially adverse to those at issue in this action.

The motion shall be DENIED.

DR5-108 (a), "Conflict of Interest; former client," provides that:

(a) Except as provided in section 1200.45(b) of this Part with respect to current or former government lawyers, a

Check One : FINAL DISPOSITION NON-FINAL DISPOSITION

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 except as permitted by section 1200.19(c) of this Part, or when the confidence or secret has become generally known.

DR4-101 "Preservation of confidences and secrets of a client," provides:

(a) Confidence refers to information protected by the attorney-client privilege under applicable law, and secret refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under section 1200.19(c) of this Part, a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

(2) use a confidence or secret of a client to the disadvantage of the client; and

(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

The Court of Appeals has stated that

Under DR5-108 (A) (1), a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse. Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification.

This rule of disqualification fully protects a client's secrets and confidences by preventing even the possibility that they will subsequently be used against the client in related litigation. This prophylactic

measure thus frees clients from apprehension that information imparted in confidence might later be used to their detriment, which, in turn, fosters the open dialogue between lawyer and client that is deemed essential to effective representation.

By mandating disqualification irrespective of any actual detriment--that is, even when there may not, in fact, be any conflict of interest--the rule also avoids any suggestion of impropriety on the part of the attorney. This not only preserves the client's expectation of loyalty but also promotes public confidence in the integrity of the Bar. Finally, the bright line rule provides a clear test that is easy to apply, thereby allowing self-enforcement among members of the Bar.

Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 131 (1996) (emphasis added, citations omitted).

The three factor test mandated by the Court of Appeals to be applied to motions to disqualify attorneys under DR5-108 is not to be applied mechanically, but requires "careful appraisal of the interests involved." Id. This is because

[d]isqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter. Disqualification motions, unfortunately, have also been used as a litigation tactic to gain strategic advantage over an adversary. Id., at 131-132.

Indeed, plaintiffs argue that Resolution 4 is engaging in just such a tactic, having waited one year and five months after it was served with the supplemental summons that listed Pfeffer as attorneys for the Melnicks and until the eve of scheduled depositions of the defendants, before moving to disqualify Pfeffer. Nonetheless, this court finds that the facts upon which the appellate court grounded its opinion in Potter v 71st

Street Lexington Corp, 8 AD3d 198 (1st Dept 2004), which involved an isolated half-hour consultation and a motion made on the eve of trial where the plaintiff was elderly tenant who had been granted a special trial preference based on her advanced age, are sufficiently distinguishable from the particular history of the instant action to warrant resolving the question of conflict raised here on its merits. Likewise distinguishable on their facts are Barnabas Hospital v NYC Health & Hosp. Corp., 7 AD3d 8 (1st Dept 2004) and Talvy v American Red Cross, 205 AD2d 143 (1st Dept 1994).

Nor does this court agree with plaintiffs' argument that in recommending Pfeffer to the Melnicks, Resolution 4 consented and waived its right to object to the Melnicks being represented by Pfeffer notwithstanding any conflict. In this regard, Hoeffner v Orick, Herrington & Sutcliffe, LLP, 14 Misc3d 324 (NY Sup Ct 2006) is inapposite, since Hoeffner involved no question whether the interests of the former client were adverse to the current representation since, unlike here, the current client had no potential claim against the former client.

As to the Teckni-Plex factors, this court finds no evidence in the record that any of the matters in which Resolution 4 undisputedly retained Pfeffer, to wit, the 2002 collection matter, the 2003 licensing agreement, the 2004 contract drafting matter or the copyright matter of 2006, were

either substantially related or materially adverse to Pfeffer's current representation of the Melnicks. Likewise, the court concurs with plaintiffs that Resolution 4 has offered no evidence that tends to show that its partners made any communications that contained confidential information to Pfeffer during any such representations.

Resolution 4 failed to establish either that Pfeffer represented it as to the Siggs project or that such matter was substantially related or materially adverse to Pfeffer's representation of the Melnicks.

Resolution 4 argues that the e-mail correspondence dated March 2, 2007 marked "Attorney-Client Privilege and Confidential" that Pfeffer sent it shows Pfeffer's continuing attorney-client relationship with Resolution 4 at the time that Pfeffer was retained by the Melnicks. Resolution 4 claims that the certification and other documents that Pfeffer secured in the course of that relationship, given the lawsuit that Pfeffer ultimately brought against Resolution 4, establish that Pfeffer's continuing representation of Resolution 4 was substantially related and materially adverse to Resolution 4's interest. Resolution 4 argues that but for its continuing lawyer-client relationship with Pfeffer, it would not have voluntarily supplied Pfeffer with such work product and other information. Resolution 4's argument misstates the rule under Tekni-Plex. That Pfeffer

continued to represent Resolution 4 with respect to the copyright matter while Resolution 4, as the Melnicks' architect, provided information to Pfeffer in connection with the Melnicks' matter, in no way establishes that the two matters were "the same or substantially related", as set forth in 1.9 of the Rules of Professional Conduct. Likewise, this argument begs the question whether any of the documents, including the certification, provided to Pfeffer, contained Resolution 4 confidences. Certainly, Resolution 4 could have no reasonable expectation that Pfeffer would maintain such documents in secret, since clearly Resolution 4 intended that Pfeffer share the information with their mutual clients at the time, the Melnicks.

It is therefore,

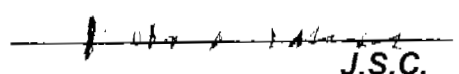
ORDERED that defendant Resolution 4's motion to disqualify plaintiffs' counsel David J. Pfeffer, is DENIED and it is further

ORDERED that the depositions of the defendants shall proceed forthwith after which the parties shall attend a status conference in IAS Part 59 on August 17, 2010.

This is the decision and order of the court.

Dated: June 21, 2010

ENTER:


DEBRA A. JAMES

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 J.S.C.