

**Steven's Distribs., Inc. v Gold, Rosenblatt &
Goldstein**

2010 NY Slip Op 31839(U)

July 12, 2010

Supreme Court, New York County

Docket Number: 106283/09

Judge: Joan A. Madden

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

Stevens Distributors Inc.

Plaintiffs,

- v -

Gold, Rosenthal & Goldstein

Defendants.

INDEX NO.

106283109

MOTION DATE

1-21-10

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for disqualify
judge

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ORDERED that this motion is decided in accordance with the attached Memorandum Decision & Order

FILED

JUL 19 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 12, 2010

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

INDEX NO. 106283/09

-----X
STEVEN'S DISTRIBUTORS, INC.,

Steven's,

-against-

GOLD, ROSENBLATT & GOLDSTEIN
and STEVEN E. GOLDSTEIN,

Defendants.

-----X
JOAN MADDEN, J.:

FILED
JUL 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendant Gold & Rosenblatt, LLC s/h/a Gold, Rosenblatt & Goldstein, LLC ("Gold & Rosenblatt") moves to disqualify the law firm of Robinson Brog Leinwand Greene Genevese & Gluck, PC ("Robinson Brog") as the attorneys for plaintiff Steven's Distributors, Inc. ("Steven's"). Steven's opposes the motion, which is granted.

BACKGROUND

At issue on this motion is whether Robinson Brog's representation of Steven's while concurrently representing a partnership in another action where the members of the defendant limited liability company in this action are general partners in that partnership gives rise to a conflict of interest warranting Robinson Brog's disqualification.

Steven's is the tenant of a commercial store located at 2944 Third Avenue, Bronx, New York (the "Premises"). Gold & Rosenblatt is a professional limited liability company and the successor to the professional limited liability company of Gold, Rosenblatt & Goldstein.¹ David Gold and Randi Rosenblatt are the sole members of Gold & Rosenblatt.

On or about May 2004, Steven's retained Gold, Rosenblatt, & Goldstein to collect the

¹According to the New York State Department of State's website, Gold, Rosenblatt & Goldstein filed as a domestic professional service limited liability company on November 24, 2003. Gold & Rosenblatt filed as a domestic professional service limited liability company on May 16, 2006.

rent and additional rent from its subtenants. On or about June 21, 2004, defendants commenced a commercial non-payment summary proceeding against the subtenants on behalf of Steven's in the Civil Court, Bronx County ("Summary Proceeding"). Steven's alleges, among other things, that defendant Steven Goldstein, a lawyer, and a member of Gold Rosenblatt & Goldstein forged interlocutory orders in the Summary Proceeding and that defendants failed to diligently prosecute said proceeding. The Summary Proceeding was ultimately dismissed after trial. Steven's claims that due to defendants' negligence, it was unable to pay the landlord and had to file for bankruptcy protection.

On or about May 5, 2009, Robinson Brog commenced this action on behalf of Steven's asserting claims for negligence and misrepresentation. Steven's claims that, due to defendants' negligence and Steven Goldstein's misrepresentations, it was harmed in the amount of \$160,000. On or about July 17, 2009, Steven Goldstein served a verified answer. On or about August 4, 2009, Gold & Rosenblatt served an answer containing affirmative defenses and a cross-claim of contribution against Steven Goldstein.

Robinson Brog also represents Winhall II Funding Associates ("Winhall II"), a real estate investment partnership, in an action pending in the Supreme Court, Westchester County (Index #23517/07) ("Winhall Action") against the law firm of DelBello, Donnellan Weingarten, Tartaglia, Wise & Wiederkehr ("DelBello") for allegedly failing to secure and collateralize a \$1.3 million real estate loan. David Gold and Randi Rosenblatt, who are the sole members of Gold & Rosenblatt, are also general partners in Winhall II. Mr. Gold and Ms. Rosenblatt own, collectively, a 7.25 % interest in Winhall II.

On or about October 15, 2009, Gold & Rosenblatt made the instant motion to disqualify Robinson Brog as counsel for Steven's in this action. Gold & Rosenblatt argues that Robinson

Brog, by representing Winhall II, has an attorney-client relationship with Mr. Gold and Ms. Rosenblatt and that the firm's simultaneous pursuit of a recovery on their behalf in the Winhall Action and a judgment against Rosenblatt & Gold in this action constitutes an impermissible conflict of interest since Robinson Brog is suing a current client. In addition, Gold & Rosenblatt argues that A. Mitchell Greene, a partner at Robinson Brog, is directly involved in both litigations and in support of this argument, submits a letter written to Mr. Greene from counsel for the defendant in the Winhall Action in which she responds to a previous letter written to her by Mr. Greene. It also submits the affirmation of Eric W. Berry who represents Gold & Rosenblatt in this action and who states that from his dealings with Robinson Brog "it is entirely clear that Mr. Greene was the Robinson Brog attorney principally responsible for this matter." Berry Affirmation, ¶ 3.

Gold & Rosenblatt also submit the affidavits of Mr. Gold and Ms. Rosenblatt. Both Mr. Gold and Ms. Rosenblatt state that Robinson Brog failed to obtain their consent to pursue this action, and that the firm refused to withdraw even after its role was protested. Ms. Rosenblatt also avers that in 2007 she was on a conference call regarding the Winhall Action and that during the call Mr. Greene acted as Winhall II's attorney.

Robinson Brog counters that the motion should be denied as the Winhall Action and this action are not "substantially related" and its representations in these matters has not caused any prejudice or put at risk any client confidences or secrets or created a situation where there would be an inhibition of future confidences. Moreover, Robinson Brog asserts that while based on their status as general partners of Winhall, Mr. Gold and Ms. Rosenblatt are technically clients of Robinson Brog, they are two of 22 partners of Winhall II and hold only a 7.25% interest in the partnership, and have no active role in the prosecution of the Winhall Action. Robinson Brog

also asserts that Mr. Greene's role in this action and the Winhall Action has been limited to attempting to settle the claims before they became enmeshed in litigation.

In support of its position, Robinson Brog submits the affirmation of Mr. Greene who states that Robinson Brog's contact with the Winhall partnership is James Coleman and not Mr. Gold or Ms. Rosenblatt and that his partner, Robert M. Milner, Esq. is the attorney with primary responsibility for prosecuting the Winhall Action, and that his only role was to attempt to settle the action and that he has not had any telephone conversation or other interactions with Mr. Gold or Ms. Rosenblatt with respect to the action. He also denies that Ms. Rosenblatt participated in any meetings and did not recall that she was on a telephone conference concerning the action. At the same time, however, Mr. Greene acknowledges that Winhall II was organized by a client of Robinson Brog named H.P. Capital, and that he is the originating partner for H.P. Capital and is responsible for billing H.P. Capital matters and that he oversees such matters at his firm, including the matter involving Winhall II.

Robinson Brog also submits that affirmation of Mr. Milner who states that the firm's representation of Winhall II "has nothing to do with Mr. Gold or Ms. Rosenblatt in a personal capacity" and that he does not "foresee any need for me, or any other attorney at Robinson Brog to engage in confidential communications with Mr. Gold or Ms. Rosenblatt in our prosecution of the Winhall II action...." (Milner Affirmation, ¶ 7). He also states that "my and Robinson Brog's ability to vigorously represent Winhall II will not be compromised by reason of the fact that Robinson Brog is suing Gold & Rosenblatt" (*Id.*, ¶ 8).

In addition, Robinson Brog asserts that while this action was commenced against a general partnership known as Gold, Rosenblatt & Goldstein, that it appears from the affidavits of Mr. Gold and Ms. Rosenblatt that the real party in interest is Gold & Rosenblatt, LLC, which is a

professional limited liability company. Under these circumstances, Robinson Brog argues that it is not suing its clients but rather a separate entity.

In reply, Gold & Rosenblatt asserts that contrary to Robinson Brog's position, the "substantial relationship" test does not apply since at issue is Robinson's Brog's simultaneous representation of a client while suing the client in another matter. Under such circumstances, it argues, a per se rule applies which requires Robinson Brog to obtain the consent of Mr. Gold and Ms. Rosenblatt or establish that there is no actual or apparent conflicts, and that the record shows that Robinson Brog cannot satisfy either of these criteria. In support of its position, Gold & Rosenblatt rely on an affidavit of Mr. Greene submitted in connection with a motion by Steven's for authorization to obtain counsel in bankruptcy proceedings, in which Mr. Greene states that he will bear "primary responsibility" for Steven's representation.

DISCUSSION

It is well-settled that "the disqualification of an attorney is a matter that rests within the sound discretion of the court." Flores v. Willard J. Price Associates, LLC, 20 A.D.3d 343, 344 (1st Dept. 2005); Nationwide Associates, Inc. v. Targee Street Internal Medicine Group, P.C., 303 A.D.2d 728 (2d Dept. 2003). A party's entitlement to be represented by a counsel of its own choosing is a valued right. Tekni-Plex v. Meyner & Landis, 89 N.Y.2d 123, 131 (1996); S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 445 (1987). At the same time, however, "[a]ttorneys owe fiduciary duties of both confidentiality and loyalty to their clients." Tekni-Plex v. Meyner & Landis, 89 NY2d at 130; Flores v. Willard J. Price Associates, LLC, 20 A.D.3d at 344. Therefore, an attorney "must avoid not only the fact, but even the appearance of representing conflicting interests." Cardinale v. Golinello, 43 N.Y.2d 288, 296 (1977). Specifically, "the lawyer may not place himself in a position where a conflicting

interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.” Flores v. Willard J. Price Associates, LLC, 20 AD3d at 344, quoting, Matter of Kelly, 23 NY2d 368, 376 (1968).

As a preliminary matter, the court finds that by representing Steven’s in this action Robinson Brog is effectively suing its own clients Mr. Gold and Ms. Rosenblatt. First, Robinson Brog has an attorney-client relationship with Mr. Gold and Ms. Rosenblatt by virtue of its representation of Winhall II in which Mr. Gold and Ms. Rosenblatt are each general partners. “A partnership is not generally considered a separate entity existing independently of the persons who control it.” Dembitzer v. Chera, 285 A.D.2d 525, 526 (2d Dept. 2001); Colon v. Aldus III Associates, 296 A.D.2d 362 (1st Dept. 2002) (“partnerships, unlike corporations, have no existence independent of the persons who create or control them”). Thus, in Dembitzer v. Chera, 285 A.D.2d 525 it has been held that a law firm’s ongoing attorney-client relationship with a partnership precluded it from representing another party in an action against a general partner owning a 50% interest in the partnership. While the interest of Mr. Gold and Ms. Rosenblatt in Winhall II is relatively small, as general partners in Winhall II they nonetheless are clients of Robinson Brog.

Next, although Mr. Gold and Ms. Rosenblatt are not defendants in this action, their professional limited liability corporation of which they are the only members is a named defendant. Given the realities of this situation, including that a limited liability company operates only through its members, the rule regarding simultaneous representation should apply. See e.g., Flores v. Willard J. Price Associates, LLC, 20 A.D.3d at 344 (holding that while corporation and not its president and principal was the actual named party, the corporation can act solely through natural persons so that president and principal is a party to whom the attorney

owed a fiduciary duty); J.P. Morgan Chase Bank v. Liberty Mutual Ins. Co., 189 F.Supp2d 20 (SD NY 2002)(holding that law firm's representation of bank in action against another client's subsidiary constituted a conflict of interest warranting firm's disqualification, even though firm did not represent subsidiary where subsidiary accounted for more than 90% of clients business, operated out of same headquarters and had same general counsel).

When, as here, the issue concerns a conflict of interest arising out of the current representation of a client as opposed to the representation of a former client, the "substantially related" test proffered by Robinson Brog which requires that the moving party demonstrate that the two representations are both adverse and substantially related does not apply. Compare Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 308 (1994); Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143 (1st Dept. 1994), aff'd., 87 N.Y.2d 826 (1995). Instead, "when the law firm simultaneously represents opposing parties in different lawsuits and 'the relationship [between attorney and client] is a continuing one, adverse representation is prima facie improper...and the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution of the vigor in representation.'" Aerojet Properties, Inc. v. State of New York, 138 A.D.2d 39, 41 (3d Dept 1988)(emphasis in original), quoting, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) See also HRH Construction, Inc. v. Palazzo, 15 Misc.3d 1130(A) (Sup Ct, NY Co. 2007).

Rule 1.7 of New York Rules of Professional Conduct (Part 1200.7),² which governs

²In support of its motion, Gold & Rosenblatt cites to DR 5-101 and 5-105 of the Code of Professional Responsibility. However, these provisions were replaced effective April 1, 2009, by the New York Rules of Professional Conduct. In any event, the relevant provisions of Rule 1.7 governing concurrent conflicts of interest are similar in substance to the relevant provisions of the Code of Professional Responsibility relied on by Gold & Rosenblatt. See, New York Professional Responsibility Report, Simon, Comparing The New York Rules of Professional Conduct to the New York Code of Professional Responsibility.

disqualification based on concurrent conflicts of interest, including those arising out of simultaneous representation, provides that:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
 - (1) the representation will involve the lawyer in representing differing interests; or
 - (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or personal interests.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

In this case, Robinson Brog has not shown that its simultaneous representation of Steven's in this action and Mr. Gold and Ms. Rosenblatt in the Winhall action will not involve an actual or apparent conflict of interest or that such representation is permissible under Rule 1.7. As a preliminary matter, there is no dispute that Mr. Gold and Ms. Rosenblatt have not consented to the conflict of interest. In fact, under the Rule 1.7(b)(3), even with the client's consent, a lawyer may not represent a client when the conflict of interest "involve[s] the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."³ (emphasis supplied). In addition, it would

³Rule 1.0 (w) (Part 1200.0) defines "Tribunal" as a "court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.

appear that the dual representation would be prohibited under 1.7 (a)(1) since Robinson Brog's representation of Steven's in this action, which entails suing the limited liability company in which Mr. Gold and Ms. Rosenblatt are members, while representing Mr. Gold and Ms. Rosenblatt as clients in the Winhall Action, involves the representation of "differing interests" which is broadly defined as including "every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." See Rule 1.0 (f) (Part 1200.0).

Moreover, the record shows that Mr. Greene of Robinson Brog is involved in the representation of Steven's in this action and Winhall II in the Winhall Action. With respect to the Winhall Action, Greene admits that he is the originating partner on the Winhall Action and that he attempted to settle the matter. In addition, the record shows that Mr. Greene is involved in the litigation of this action and stated in bankruptcy proceeding pending against Steven's that he would bear "primary responsibility" for pursuing litigation on Steven's' behalf. Given Mr. Greene's involvement in an action in which his firm represents Mr. Gold and Ms. Rosenblatt as general partners and this litigation against a professional liability company whose sole members are Mr. Gold and Ms. Rosenblatt, Robinson Brog cannot show an absence of, at the very least, an apparent conflict of interest and loyalties.

Thus, for example, as counsel to Winhall II, Robinson Brog knows about an asset held by Mr. Gold and Ms. Rosenblatt, which could potentially provide leverage in settling this action. Furthermore, given the nature of the allegations in this action, including that a former member of the predecessor limited liability company forged court orders, Robinson Brog may come into possession of sensitive information that could adversely affect the firm's attorney-client relationship with Mr. Gold and Ms. Rosenblatt.

Finally, in finding that Robinson Brog should be disqualified as counsel, the court notes

that this action is in its early stages, so that any harm caused to Steven's in granting his motion will be minimal. Compare Aerojet Properties, Inc. v. State of New York, 138 AD2d at 42 (denying motion to disqualify law firm as counsel for the claimant where the firm had extensively involved in the action for more than four years). In this regard, the court notes that Robinson Brog fails to submit an affidavit from the Steven's showing how it will be harmed in the event of Robinson Brog's disqualification.

CONCLUSION

In view of the above, it is

ORDERED that the motion to disqualify Robinson Brog as counsel for Steven's is granted and Robinson Brog is hereby disqualified from representing Steven's in this matter; and it is further

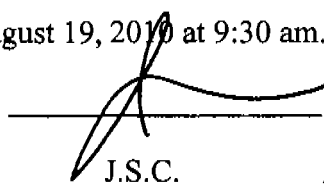
ORDERED that the action is stayed for 30 days from service of a copy of this order with notice of entry upon the parties and upon Steven's who shall, within said period, retain another attorney in the place and stead of the attorney named above; and it is further

ORDERED that the new attorney retained Steven's shall serve upon all parties a notice of appearance and file the same with the Clerk of the Trial Support Office (Room 158), and the Clerk of Part 11 within said 30-day period; and it is further

ORDERED that counsel are directed to appear at a preliminary conference in part 11, Room 351, 60 Centre Street, New York, NY, on August 19, 2010 at 9:30 am.

Dated: ~~June~~, 2010

July 12, 2010



J.S.C.

FILED
JUL 19 2010
NEW YORK
COUNTY CLERK'S OFFICE