

JSB Partners LLC v Colabella

2011 NY Slip Op 30657(U)

March 16, 2011

Sup Ct, New York County

Docket Number: 600524/10

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Miller

PART 11

Index Number : 600524/2010
JSB PARTNERS LLC
 vs.
COLABELLA, ANDREA
 SEQUENCE NUMBER : 001
 DISQUALIFY COUNSEL

INDEX NO. _____
 MOTION DATE 11/18/10
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for disqualify

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 unopposed Memorandum Decision & Order.

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

FILED

MAR 21 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: March 16, 2011

 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

-----X

JSB Partners LLC,

Plaintiff,

Index No. 600524/10

-against-

FILED

Andrea Colabella, Steven Shapiro
and Cardea Group Inc.,

Defendants.

MAR 21 2011

-----X

Joan A. Madden, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants seek an order disqualifying Paul Pincus, Esq. ("Pincus") and Rubin & Bailin, LLP ("Rubin & Bailin") from representing plaintiff JSB Partners LLC ("JSB") in this action. JSB opposes the motion, which is denied for the reasons below.

Background

JSB is an executive recruiting firm in New York, New York. Defendant Andrea Colabella ("Colabella") is a recruiter who was employed by JSB from January 7, 2008 until November 9, 2009. Defendant Steven Shapiro ("Shapiro") was employed by JSB from February 7, 2006 until November 9, 2009. Defendant Cardea Group Inc. ("Cardea") is a New York corporation founded by Colabella and Shapiro to provide professional staffing.

Rubin & Bailin is the attorney of record for JSB in this action and has represented JSB since its inception, approximately 10 years ago. Pincus is a member of Rubin & Bailin. Non-party Joseph Barr ("Barr") is the president of JSB.

Boston Networking Group, Inc. is a recruiting firm and New York Networking is its affiliate (together "Networking"). Colabella worked for Networking from April 2005 until January 2008.

The complaint alleges that when they were hired by JSB Colabella and Shapiro each signed an employee agreement (hereinafter "the JSB Employee Agreement") that restricted their ability to use JSB's confidential information and limited their ability to compete with JSB and to solicit JSB's clients during their employment and for 18 months after their employment with JSB ended. The complaint further alleges that, as part of their employment, Colabella and Shapiro learned of individuals and entities that were JSB's clients and prospective clients and that they wrongfully converted and used this information. The complaint also alleges that JSB believes, based contacts with its clients, that Colabella and Shapiro used confidential information to contact and solicit JSB's clients in violation of their obligation under the JSB Employee Agreement. The complaint seeks compensatory and punitive damages and injunctive relief for defendants' allegedly wrongful conduct.

Defendants answered the complaint and asserted various counterclaims, including a counterclaim seeking the recovery of unpaid commissions pursuant to Labor Law § 190.

Defendants now seeks to disqualify Pincus and Rubin & Bailin from representing JSB in this action based on allegations that they previously represented Colabella. Specifically, in her affidavit, Colabella states that, on January 7, 2008, she received a letter (hereinafter "the 2008 Letter") from Michael D'Orsi, Esq., Networking's counsel, contending that she was improperly soliciting Networking's clients and revealing Networking's confidential information in breach of her contracts with Newtworking. (Colabella affidavit dated July 21, 2010, ¶¶ 6, 9-10). She further states that she discussed the matter with Barr, that Barr called Pincus to handle the matter and that Pincus asked her questions concerning the 2008 Letter's allegations (*id.*, ¶¶ 14-15).

Colabella also states that, after hearing her answers, Pincus told her, in substance, that the restrictive covenants and non-solicitation provisions that she had entered into with Networking were unenforceable in New York State and that, on January 16, 2008, Pincus sent a letter (the 2008 Response Letter) responding to the 2008 Letter to that effect (*id.*, ¶¶ 15-17, 23-28). According to Colabella, she "understood" that Pincus would be her lawyer with respect to her issues with Networking, and that she had no other contact with Networking thereafter (*id.*, ¶ 21)

Colabella further states that she resigned from JSB's employment on November 9, 2009, and sent JSB a letter stating the amounts she was owed for unpaid commissions and that she had no JSB confidential information in her possession (*id.*, ¶ 34). She also notes that Pincus is representing JSB in this action for breach of non-competition and non-solicitation agreements and claims that these cover "the same issue for which he represented (her)" (*id.*, ¶ 37).

In opposition, JSB argues that Pincus represented it and not Colabella, and submits an affidavit from Barr and Pincus' affirmation in support of this argument. (See, Barr affidavit, ¶¶ 1-2; Pincus affirmation, ¶ 12). JSB also notes that the 2008 Letter was addressed to Colabella at JSB's office, that Barr discussed the matter with Pincus separately, and that the 2008 Response Letter stated that Rubin & Bailin was representing JSB.

JSB also points out that Colabella never signed a retainer agreement with Rubin & Bailin or with Pincus and that she was never billed for or paid for the legal services that Pincus provided (Pincus affirmation, ¶ 18). Pincus states that he never told Colabella that he was her lawyer, that his actions were on behalf of JSB, and that he never received any confidential information from Colabella (*id.*, ¶¶ 18-20, 22).

JSB also argues that Colabella's conduct with respect to the JSB Employment Agreement is separate from her conduct and obligations regarding Networking, and that any advice given to her concerning the whether the non-competition and non-solicitation agreements in her employment agreements with Networking were enforceable in New York is a legal issue and not a factual matter that mandates Pincus's testimony (*id.*, ¶ 31).

Discussion

Disqualification involves the denial of a party's right to counsel of its own choice, protecting this right is valued and restricting it is disfavored (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). Consequently, the party seeking disqualification bears the burden of making "a clear showing that disqualification is warranted" (*Aryeh v Aryeh*, 14 AD3d 634, 634 [2d Dept 2005]; see also *Petrossian v Grossman*, 219 AD2d 587 [2d Dept 1995]).

An attorney may not 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" (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 97 [1st Dept 2008]). "(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" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]).

Before applying this rule, it must first be determined whether Pincus (and his firm) represented Colabella or JSB when he responded to 2008 Letter from Networking. In general, in determining whether an attorney-client relationship the courts have considered the parties' actions (*Wei Cheng Chang v Pi*, 288 AD2d 378, 380 [2d Dept 2001], *lv denied* 99 NY2d 501 [2002]). "An attorney-client relationship exists where there is a specific undertaking to perform a specific task" (*id*). "While the existence of the relationship is not dependent upon the payment of a fee, or an explicit agreement, a party cannot create a relationship based on his or her own beliefs or action" *Pellegrino*, 49 AD3d at 99.

The standard for determining the existence of any attorney client relationship is modified when, as here, a corporate counsel performs legal work for the employee of the corporation. In such cases, it has been held that "[u]nless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees" (*Talvy v American Red Cross in Greater N.Y.*,

205 AD2d 143, 149 [1st Dept 1994], *affd* 87 NY2d 826 [1995]).

In this matter, the 2008 Letter was addressed to Colabella at JSB's office. The 2008 Response Letter stated that Rubin & Bailin represented JSB. Rubin & Bailin had represented JSB on a variety of legal matters since JSB's inception, a period of more than 10 years. Colabella was never billed for and never paid for Pincus's legal work. She only stated that she understood that Pincus was representing ~~her~~ ^{on} her issues with Networking, but she has not contended that either JSB or Pincus stated that Pincus or Rubin & Bailin were representing her.

Under these circumstances, Colabella has not established that the parties expressly agreed to vary from the general rule that a corporation's attorneys represent it and not its employees (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]; *Talvy*, 205 AD2d at 149). She has presented her own belief that Pincus was her attorney, but this is insufficient to demonstrate that there was an attorney-client relationship (*Pellegrino*, 49 AD3d at 99).

Moreover, even if it could be argued that Pincus jointly represented Colabella and JSB, under such circumstances, Colabella would have no expectations of confidentiality with respect to information related to the joint representation such that disqualification would be appropriate based on such joint

representation (*Volo Glogistics LLC v. Varig Logistica S.A.*, 51 AD3d 554, 555 [1st Dept 2008])).

Next, Colabella has not met her burden of establishing the existence of a substantial relationship between the issues in the this action and those in the matter involving Networking. Colabella's conduct with respect to Networking is independent of whether she violated the JSB Employee Agreement. While there is some similarity as to the nature of dispute between Colabella and Networking and that involved in instant action, the factual issues underlying the two matter are wholly distinct as they are dependent upon the particular nature of the specific contractual provisions and the allegedly wrongful conduct (*BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999]; *Healthworld Corp. v Gottlieb*, 12 AD3d 278 [1st Dept 2004]; *Lightening Park v. Wise Lerman & Katz*, 197 AD2d 52, 55 [1st Dept 1994])). Thus, Colabella has not made the clear showing sufficient to warrant disqualification (*Aryeh*, 14 AD3d at 634)

Colabella also asserts that Pincus should be disqualified under the advocate as witness rule. Specifically, she argues that Pincus's testimony is necessary based upon Barr's statements that Pincus purportedly told him that JSB Employee Agreement's provisions regarding non-competition and non-solicitation were

unenforceable (Colabella affidavit, ¶¶ 40-42).¹

Under the advocate as witness rule contained in the Rule 3.7 of The Rules of Professional Conduct,² an attorney is prohibited from acting as an advocate before a tribunal where he or another attorney from his firm is likely to be called as a witness on a significant issue other than on behalf of its client, where it is apparent that the testimony may be prejudicial to the client.

A party seeking disqualification based on this rule "carries

¹Barr denies that he told Colabella that the provisions were unenforceable. Instead, in his affidavit, Barr states that he told Colabella that enforcement of non-competition and non-solicitation agreements was difficult and dependent upon the circumstances (Barr affidavit, ¶ 26).

²Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.29) provides that:

(a) a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless: (1) that testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal.

(b) a lawyer shall not act as advocate before a tribunal in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client and it is apparent that the testimony may be prejudicial to the client; or (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

a heavy burden of identifying projected testimony of the advocate-witness and demonstrating how it would be 'so adverse to the factual assertions or account of the events offered on behalf of the client as to warrant his disqualification'" (Broadwhite Associates v. Truong, 237 AD2d 162, 163 [1st Dept 1997], quoting, Martinez v. Suozzi, 186 AD2d 378, 379 [1st Dept 1992]). In addition, "[u]nder New York law, the mere fact that an attorney was involved in the transaction at issue, or that his proposed testimony would be relevant or highly useful is insufficient to warrant disqualification; rather, the crucial inquiry is whether the subject testimony is necessary, taking into account such factors as the significance of the matter, the availability of other evidence and the weight of the testimony" (Brooks v. Lewin, 48 AD3d 289 [1st Dept], lv dismissed in part and denied in part, 11 NY3d 826 [2008]).

Under this standard, defendants have not met their burden of demonstrating that any purported testimony from Pincus would be necessary such as to warrant his disqualification. In the first place, any testimony regarding the legal opinion expressed by Pincus to Barr regarding whether the provisions at issue were enforceable is not necessary as such testimony relates to a legal issue is for the court to decide based on the provisions in the JSB Employee Agreement. In addition, any knowledge Mr. Pincus may have regarding Colabella's dispute with Networking is

irrelevant to this action.

Accordingly, defendants have not met their burden of showing that disqualification JSB's attorneys is warranted, and the motion must be denied.

Conclusion

In view of the above, it is

ORDERED that defendants' motion to disqualify Paul Pincus, Esq. and Rubin & Bailin, LLP is denied.

DATED: March 16, 2011


U.S.C.

FILED

MAR 21 2011

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