

**Getzel Schiff & Ross, LLP v Mach One Consultants,
LLC**

2011 NY Slip Op 32715(U)

October 14, 2011

Supreme Court, Nassau County

Docket Number: 001323-11

Judge: Timothy S. Driscoll

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SCAN

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
GETZEL SCHIFF & ROSS, LLP,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 001323-11
Motion Seq. No: 1
Submission Date: 9/13/11**

- against -

**MACH ONE CONSULTANTS, LLC, ROBERT M.
FEIN & COMPANY CPA'S, PLLC, and JOEL
R. MACHER,**

Defendants.

-----X

The following papers having been read on this motion:

- Notice of Motion, Affidavit in Support, Exhibits and Memorandum of Law.....X**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....X**
- Affirmation in Reply.....X**

This matter is before the court on the motion filed by Plaintiff Getzel Schiff & Ross, LLP ("GSR" or "Plaintiff") on July 20, 2011 and submitted on September 13, 2011. For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order disqualifying the law firm of Steven H. Sewell, PC ("Sewell") from representing the Defendants in this matter.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. C to to Sewell Aff. in Opp.) alleges as

follows:

First Cause of Action

On or about May 6, 2004, Defendant Mach One Consultants, LLC ("Mach One") entered into a written sublease agreement ("Sublease") with GSR to rent office space. Rental payments were made both by Mach One and Robert M. Fein & Company, CPAs, PLLC ("Fein"), an entity believed to be controlled by the principals of Mach One. Although the Sublease was in the name of Mach One, both Mach One and Fein occupied and enjoyed the use of the Sublet premises ("Premises"). Pursuant to the terms of the Sublease, Mach One was to make base rent payments to GSR in the amount of \$42,000 annually, or \$3,500 monthly. In addition, Mach One was responsible for additional rent in the form of additionally rented office equipment.

By writing dated March 1, 2009, Mach One notified GSR that it would be extending the Sublease through April 30, 2014 ("Extension"), pursuant to Paragraph 33 of the Sublease. On or about June 13, 2010, Mach One, through its "alter ego" Fein (Compl. at ¶ 14), made a final Sublease payment to GSR but has made no further payments. On or about May 21, 2010, Mach One, through Fein, notified GSR that it would terminate the Sublease on June 30, 2010, allegedly in violation of the terms of the Sublease. GSR has been unable to rent the Premises to another subtenant.

Plaintiff alleges that, in reliance on the Extension and the representations of Defendant Joel R. Macher ("Macher"), Plaintiff declined qualified alternate subtenants for the Premises and continued its lease with its Landlord for the Premises. Plaintiff alleges that, as a result, Mach One breached its contract with GSR.

Second Cause of Action

Plaintiff alleges that, as a result of the conduct outlined in the First Cause of Action, Fein breached its contract with GSR.

Third Cause of Action

Plaintiff alleges that, as a result of the conduct outlined in the First Cause of Action, Mach One has been unjustly enriched.

Fourth Cause of Action

Plaintiff alleges that, as a result of the conduct outlined in the First Cause of Action, Fein

has been unjustly enriched.

Fifth Cause of Action

Plaintiff alleges that Macher, by virtue of his alleged misrepresentations in connection with the Extension, committed fraud on Plaintiff.

In his Affidavit in Support of the instant motion, Stephen A. Ross ("Ross"), a partner in the Plaintiff accounting firm, affirms that in or about May of 2010, he consulted with Sewell regarding a partnership dispute ("Prior Dispute"). The Prior Dispute involved Ross' dissatisfaction with his partnership income, and his belief that he was entitled to more money. Ross affirms that he provided Sewell with copies of the partnership's original and amended partnership agreement, and Sewell subsequently wrote a letter to GSR on Ross' behalf dated October 27, 2010 (Ex. A to Ross Aff. in Supp.). In the October Letter, Sewell advised GSR that he had been retained by Ross "in connection with the partnership of [GSR]" and requested the opportunity to discuss the amended partnership agreement with GSR and its counsel.

Ross affirms that, in connection with the Prior Dispute, he also discussed with Sewell the sources of the partnership's income, including active matters for which GSR was billing on a monthly basis. Sewell subsequently drafted a letter dated December 8, 2010 to GSR (Ex. B to Ross Aff. in Supp.) in which Sewell submitted comments on Ross' behalf regarding the amended partnership agreement, as GSR had requested. GSR and Ross subsequently resolved the Prior Dispute. On or about January 1, 2011, Sewell provided Ross with an invoice for his services (*id.* at Ex. C), which Ross paid.

On or about February 2, 2011, Plaintiff commenced this action ("Instant Action"). On or about February 24, 2011, Sewell provided Ross with a letter (Ex. D to Ross Aff. in Supp.) that was addressed to Ross at his home, and was also sent to Mach One to the attention of Macher and to Fein to the attention of Robert M. Fein ("Mr. Fein") ("Waiver Letter"). In the Waiver Letter, Sewell advised the recipients that "In my opinion, I could not represent the Defendants, while I still represented [Ross]. Furthermore, in my opinion, even if I no longer represented [Ross], I could not represent the Defendants in this lawsuit without the express written consent of [Ross] permitting me to do same." The Waiver Letter also provided as follows:

If it is acceptable to each of you that I represent the Defendants in the above captioned matter, despite my representation of [Ross], a partner with [GSR], I request that each of

you sign your name below, indicating your agreement, scan and return the complete document...to my by e-mail as soon as possible. Upon my receipt of a signed copy from each of you, my representation of the Defendants shall begin, and my representation of [Ross] shall end during the pendency of this lawsuit.

In his Affirmation in Opposition, Sewell affirms that, in connection with his “brief” representation of Ross in the Prior Dispute (“Prior Representation”) (Sewell Aff. in Opp. at ¶ 4), Ross provided him with a “limited number of documents” (*id.*). Those documents consisted of the original partnership agreement from 2004 and the proposed amended agreement. Ross affirms that he did not receive or review any of GSR’s tax returns, financial records, or any other internal documents. During the Prior Representation, the only correspondence that he sent to GSR was the two letters to which Ross refers in his Affidavit, and Sewell did not receive a response to those letters. Moreover, Sewell never spoke or met with anyone associated with GSR, GSR’s current attorney or any other attorney on GSR’s behalf. In late December 2010 to early January 2011, Ross “decided to put things on hold” (*id.* at ¶ 7) and Sewell provided no further legal services to Ross after that time.

Based on his belief that it was appropriate for Ross, Mr. Fein and Macher to authorize Sewell to represent Defendants in this action, Sewell prepared the Waiver Letter which Ross, Mr. Fein and Macher signed (Sewell Aff. in Opp. at Ex. E). As reflected in the Waiver Letter, Sewell was not concerned about a conflict caused by facts he obtained during the Prior Representation, but rather wanted to address the fact that Ross was a partner in GSR, and Sewell would be asserting positions adverse to GSR in the Instant Action.

In reply, Plaintiff submits that information, including the income stream of GSR, was divulged during the Prior Representation. Plaintiff contends that this information is relevant to the Instant Action, in part because it may include details regarding Plaintiff’s expenditures and income from real estate holdings and rent, which are pertinent to the Instant Action involving a landlord-tenant dispute. Plaintiff also disputes Defendants’ claim that Plaintiff has delayed in filing its motion, and suggests that the Waiver Letter constitutes an acknowledgment by Sewell of a conflict of interest.

C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to disqualification of Sewell as counsel

for Defendants by establishing that 1) the Prior Representation existed; 2) the Prior Representation and Instant Action are substantially related given that “the income stream of [GSR] is encompassed in the claims of the Plaintiff” (P’s Memo. of Law); and 3) the interests of Defendants and Ross are mutually adverse.

Defendants oppose Plaintiff’s motion, submitting that there is “absolutely no relationship” between the Prior Representation and the Instant Action (Sewell Aff. in Opp. at ¶ 14). Defendants note that Ross has not alleged that he and Sewell discussed the landlord-tenant dispute at issue in the Instant Action during the Prior Representation. Defendants also argue that, given Plaintiff’s delay in filing the instant motion, it is apparent that the motion is an effort to deny Defendants the right to counsel of their choice.

RULING OF THE COURT

A party’s valued right to be represented in ongoing litigation by counsel of its own choosing should not be abridged, absent a clear showing that disqualification is warranted. *Horn v. Municipal Information Services, Inc.*, 282 A.D.2d 712 (2d Dept. 2001), citing *Olmoz v. Town of Fishkill*, 258 A.D.2d 447 (2d Dept. 1999); *Feeley v. Midas Props.*, 199 A.D.2d 238 (2d Dept. 1993). Accordingly, the movant has the burden of establishing grounds for the disqualification of Defendant’s counsel. *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123, 131 (1996), *rearg. den.*, 89 N.Y.2d 917 (1996); *Solow v. W.R. Grace Co.*, 83 N.Y.2d 303, 308 (1994); *see also, S & S Hotel Ventures, Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445 (1987). A party seeking disqualification of opposing counsel must establish that (1) there is a prior attorney-client relationship between the moving party and opposing counsel; (2) the matters involved in both representations are substantially related; and (3) the interests of the current client and former client are materially adverse. *M.A.C. Duff, Inc. v. ASMAC, LLC*, 61 A.D.3d 828 (2d Dept. 2009) citing *Tekni-Plex, Inc. v. Meyner and Landis, supra*, at 131; *Calandriello v. Calandriello*, 32 A.D.3d 450, 451 (2d Dept. 2006); *Columbus Constr. Co., Inc. v. Petrillo Bldrs. Supply Corp.*, 20 A.D.3d 383 (2d Dept. 2005).

When the moving party can demonstrate each of these factors, an irrebuttable presumption of disqualification follows. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94, 98 (1st Dept. 2008), citing *Tekni-Plex, Inc. v. Meyner and Landis, supra*, at 131. Conversely,

the movant's failure to make the requisite showing as to each of the criteria means that no such presumption arises. *Pellegrino v. Oppenheimer & Co., Inc.*, *supra*, at p. 98, citing *Kassis v. Teacher's Ins. & Annuity Assn.*, 93 N.Y.2d 611, 617 (1995); *Tekni-Plex, Inc. v. Meyner and Landis*, *supra*, at 132.

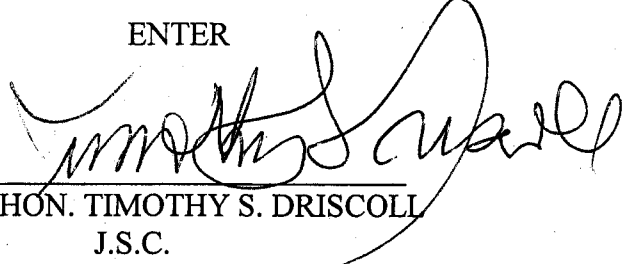
The Court denies Plaintiff's motion based on the Court's conclusion that the Prior Representation, which involved Ross' dissatisfaction with his partnership remuneration, and the Instant Action, which is a landlord-tenant matter involving Defendants' alleged failure to make required payments pursuant to the Sublease, are not substantially related. The Court notes that Plaintiff has not alleged that Ross discussed the landlord-tenant matter during the Prior Representation, and is not persuaded that the limited documentation reviewed by Sewell during the Prior Representation is relevant to the issues in the Instant Action, which relate to whether Defendants breached the Sublease by failing to pay rent.

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 for a Certification Conference on November 17, 2011 at 9:30 a.m.

DATED: Mineola, NY
October 14, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE