

Marie Holdings, Inc. v VS Brothers, LLC

2011 NY Slip Op 33670(U)

June 23, 2011

Supreme Court, Nassau County

Docket Number: 022671-10

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

-----x
MARIE HOLDINGS, INC.,

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

Plaintiff,

**Index No: 022671-10
Motion Seq. No: 3
Submission Date: 5/10/11**

-against-

**VS BROTHERS, LLC, PANKAJ BHAGAT and
NICK PETIKAS,**

Defendants.

-----x

The following papers have been read on this motion:

- Order to Show Cause, Emergency Affirmation,
Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Defendants VS Brothers, LLC ("LLC") and Pankaj Bhagat ("Bhagat") ("Moving Defendants") on April 7, 2011 and submitted on May 10, 2011, following oral argument before the Court. For the reasons set forth below, the Court denies the Order to Show Cause in its entirety.

A. Relief Sought

Defendants LLC and Bhagat move for an Order 1) pursuant to CPLR § 3101, dismissing this action in its entirety due to the alleged misconduct of Reynolds, Caronia, Gianelli, Hagney, La Pinta & Quatela, L.L.P., specifically Scott J. Kreppein, Esq. ("Kreppein") and Joseph A. Quatela, Esq. ("Quatela") (collectively "Plaintiff's Counsel"), based on their having communicated with and provided legal advice to Defendant Nick Petikas ("Petikas"), a

managing member and owner of the LLC who does not currently have legal representation in his personal capacity, for purposes other than providing advice to secure legal counsel, allegedly in violation of the Rules of Professional Conduct; or, alternatively, 2) disqualifying Plaintiff's Counsel on the grounds that it has improperly communicated with Petikas and suppressing from use in this action all improperly obtained information, including an affidavit of Petikas dated February 25, 2011 ("Petikas Affidavit"); 3) pursuant to CPLR § 2201, staying all proceedings and pending motions pending the determination of this Order to Show Cause; 4) pursuant to CPLR § 6301, preliminarily enjoining and restraining Plaintiff Marie Holdings, Inc. ("Plaintiff"), Plaintiff's Counsel and other persons acting on their behalf from engaging in improper communications with Petikas; and 5) imposing sanctions, attorney's fees and costs on Plaintiff and Plaintiff's Counsel for their allegedly improper conduct.

Plaintiff and Plaintiff's Counsel oppose the application.

B. The Parties' History

Erik M. Bashian ("Bashian"), a member of the law firm representing Defendants LLC and Bhagat, submits that Plaintiff's Counsel has communicated with and provided legal counsel to Petikas in connection with his preparation of the Petikas Affidavit. Bashian submits that Plaintiff's Counsel provided this assistance "for the sole purposes of obtaining an unfair and improper advantage" over the Moving Defendants and Petikas in his individual capacity. Bashian provides a copy of the Petikas Affidavit (Ex. A to Bashian Aff. in Supp.) and a copy of the statement for professional services of Plaintiff's Counsel ("Billing Statement") (*id.* at Ex. B). Bashian affirms that Petikas is a managing member of the LLC.

Bashian affirms that Plaintiff, through prior counsel, commenced this action by filing a motion for summary judgment in lieu of complaint ("Prior Motion") pursuant to CPLR § 3213 to recover monies from the Defendants allegedly owed pursuant to a Home Equity Line Agreement ("Loan Agreement"). The Moving Defendants opposed that motion, and cross moved for summary judgment ("Prior Cross Motion"), based on their claim that no payment of money was issued by the Plaintiff to, or on behalf of, the Moving Defendants under the Loan Agreement. Bashian provides copies of the relevant submissions of the Moving Defendants (Ex. F to Bashian Aff. in Supp.).

Plaintiff subsequently substituted Plaintiff's Counsel in place of its prior counsel.

Plaintiff's Counsel served Bashion with reply/opposition papers in connection with the Prior Motion and Cross Motion, which included the Petikas Affidavit and the Billing Statement. This action has not yet been converted into a plenary action and no discovery has been conducted.

In the Petikas Affidavit, Petikas affirms, *inter alia*, that 1) he is a managing member of the LLC; and 2) he is aware of his right to retain counsel, and the fact that he is not obligated to provide his Affidavit. Petikas describes the formation of the LLC and the circumstances under which the LLC borrowed money from Plaintiff. He affirms that the LLC borrowed \$175,000 ("Loan") from Plaintiff to finance the purchase of certain property ("Property"), and obtained a line of credit ("Line of Credit") in the amount of \$900,000 from Plaintiff, and Petikas and Bhagat personally guaranteed the Loan and Line of Credit. Petikas and Bhagat were represented by an experienced real estate attorney throughout all phases of these transactions. Petikas also affirms that construction on the Property was delayed by the LLC's inability to obtain the variance necessary to subdivide the Property. During these delays, Plaintiff granted Petikas' requests for extensions of time with respect to the Loan.

Petikas also affirms as follows:

In both my individual capacity and as a member and managing agent of [the LLC], I do not have a defense to either [the Loan] or any monies borrowed...against the [Line of Credit]. There is no doubt that (i) both [Bhagat] and I executed these agreements in our corporate and personal capacities; (ii) we are responsible for the loans in both our corporate and individual capacities; (iii) the loans are in default; (iv) we have made no attempts to cure the defaults; and (v) we have not paid any part of the outstanding loan balances, except for one payment in the amount of \$7,430 which was made on or about April 30, 2010 and was applied to the outstanding line of credit.

Petikas Aff. at ¶ 9

Petikas avers that he does not oppose Plaintiff's Motion and that, prior to this action being filed, he and Bhagat met with Mr. Gubitosi ("Gubitosi"), the President of Plaintiff, in an effort to resolve this matter. Bhagat, however, was not amenable to any proposed resolution.

In his affidavit in connection with the Prior Motion and Cross Motion ("Bhagat Affidavit") (Ex. F to OSC), Bhagat affirms, *inter alia*, that 1) the attorney who represented him in connection with the Loan and Line of Credit had a conflict of interest in light of his representation of Petikas and the LLC; 2) Bhagat has commenced a malpractice action against

the attorney based on this allegedly improper representation; 3) Petikas and Bhagat agreed that their initial capital contributions to the LLC would be used to fund the purchase of the Property, and no mortgage or loan would be issued to the LLC; 4) Bhagat never agreed to take out a loan, either in his individual capacity or as a member of the LLC, for purposes of purchasing the Property; and 5) neither Petikas nor the attorney ever informed Bhagat that a Line of Credit would be involved in the transactions.

In his Affirmation in Opposition to the motion *sub judice*, Krepplein submits that the Court should deny the application of the Moving Defendants because Plaintiff did not engage in sanctionable conduct. Krepplein claims that Plaintiff's Counsel did not communicate directly with Petikas, and maintains that, in any event, such communication would not be categorically prohibited. Moreover, it would be a violation of the Ethical Rules regarding communications, conflict of interest and dual representation for Bhagat's attorneys, who also represent the LLC, to represent Petikas in light of Bhagat's assertion of claims against Petikas. Krepplein notes that Bhagat has accused Petikas of fraud and has argued that, notwithstanding the fact that Bhagat signed the loan documents, Petikas was intended to be the sole obligor on the loan (Bhagat Aff. at pp. 10-11, 14-15). Krepplein further notes that Bhagat expresses his belief that Petikas "may have been acting in cahoots" with Plaintiff "to deceive [Bhagat] into executing the purported Subject Loan Agreement, as an obligor, without my knowledge" (*id.* at ¶ 45).

Krepplein avers, further, that after the Moving Defendants served their opposition in connection with the Prior Motion, Gubitosi advised Krepplein that Gubitosi had spoken to Petikas who did not dispute his liability under the loan instruments. Gubitosi also advised Krepplein that Petikas wished to execute an affidavit in response to the claims made by Bhagat in his Affidavit. In light of this information, Krepplein drafted an affidavit for Petikas' signature which he gave to Gubitosi to present to Petikas. Gubitosi returned the affidavit, which contained corrections requested by Petikas, to Plaintiff's Counsel. Attorney Quatela incorporated those corrections into the Petikas Affidavit and returned it to Gubitosi. In turn, Gubitosi provided the affidavit to Petikas, who ultimately executed it.

C. The Parties' Positions

Moving Defendants submit that the Court should not permit Plaintiff to continue its prosecution of the instant action with the Petikas Affidavit which, they maintain, was improperly

obtained by Plaintiff's Counsel. Moving Defendants further argue that Plaintiff's Counsel has breached the attorney-client privilege between counsel for Moving Defendants and VS Brothers. As a result, Plaintiff's Counsel may also be privy to confidential business information that was obtained in violation of the Rules of Professional Conduct. Finally, Moving Defendants argue that Kreppin and Quatela are now potential witnesses in this action. Accordingly, Moving Defendants submit, the Court should grant the instant motion in its entirety or, at a minimum, direct that Plaintiff's Counsel is disqualified and all improperly obtained information, including the Petikas Affidavit, may not be used in this action, or any future plenary action.

Plaintiff's Counsel opposes the application submitting that 1) counsel for the Moving Defendants may not represent Petikas and the LLC in light of the fact that Petikas (a) is a one-half owner of the LLC, (b) disagrees with Bhagat's defense of this action and (c) is accused by Bhagat of misconduct; 2) Gubitosi, the President of Plaintiff, has the right to communicate with Petikas; 3) Plaintiff's Counsel had no direct communication with Petikas, and did not cause the communications between Gubitosi and Petikas to occur; 4) the preparation of the Petikas Affidavit did not constitute the giving of legal advice, except for Petikas' reference to his right to secure counsel, but rather was factual in nature; and 5) the issues raised in the motion *sub judice* only bear on the weight that the Court should give the Petikas Affidavit; they do not establish any improper conduct warranting the relief requested.

RULING OF THE COURT

The Court concludes that the applicable rule with respect to the motion *sub judice*, is Rule 4.3 of the Rules of Professional Conduct, which sets forth the standards by which an attorney can communicate with unrepresented persons. The Court reaches the conclusion that Petikas is "unrepresented" in light of the following: (1) Counsel for Moving Defendants does not assert that he represents Petikas; (2) it appears that Counsel for Moving Defendants could not represent Petikas in any event, given Bhagat's statement that Petikas "may have been acting in cahoots" with Plaintiff "to deceive [Bhagat] into executing the purported Subject Loan Agreement, as an obligor, without my knowledge;" and (3) no separate counsel has entered an appearance on Petikas' behalf.

The applicable rule provides as follows:

Rule 4.3 Communicating With Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

In light of the unrefuted affirmation of Plaintiff's Counsel that Gubitosi alone communicated with Petikas, and that communication was not at the behest of Plaintiff's Counsel, the Court concludes that Plaintiff's Counsel did not violate Rule 4.3 in obtaining the Petikas Affidavit. Moreover, even assuming, *arguendo*, that Plaintiff's Counsel played some role in Gubitosi's communications with Petikas, Moving Defendants have not established that Plaintiff's Counsel provided legal advice to Petikas or otherwise communicated with Petikas in a manner that violated Rule 4.3. Accordingly, the Court denies the Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

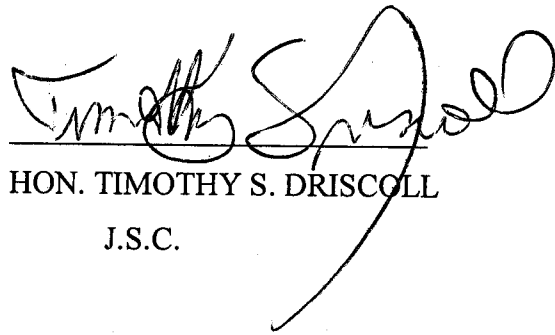
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on July 7, 2011 at 9:30 a.m. for oral argument on other motions pending before the Court.

ENTER

DATED: Mineola, NY

June 23, 2011


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

ENTERED
JUN 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE