

DeGregorio v S.J.B. Assoc., LLC

2011 NY Slip Op 34160(U)

August 3, 2011

Supreme Court, Suffolk County

Docket Number: 21860/2009

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

PUBLISH

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: **05-10-2011**
Motion Submit Date: **05-17-2011**
Motion Sequence No.: **006 MD**
 FINAL
 NON-FINAL

_____X
**JOHN DEGREGORIO, individually and as
president of the Board of Directors of the
Greens at Half Hollow Home Owners
Association, Inc., and the Greens at Half Hollow
Home Owners Association, Inc.,**

Plaintiff,

-against-

**S.J.B. ASSOCIATES, LLC., GREENS AT HALF
HOLLOW LLC., STEVEN KAPLAN, ADRIATIC
DEVELOPMENT CORP., LLC., RUSSELL MOHR,
JOSEPH LAFFERTY, JAMES KAPLAN AND THE
TOWN OF HUNTINGTON,**

Defendants.

_____X

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ORDERED that the motion (motion sequence # 006) by defendants S.B.J. Associates, LLC, Greens at Half Hollow LLC, Steven Kaplan, Adriatic Development Corp. LLC, Russell Mohr, Joseph Lafferty, and James Kaplan ("Defendants") to disqualify plaintiffs' counsel, the law firm of Hamburger, Maxson, Yaffe, Knauer & McNally, LLP ("HMYKM") from representing plaintiffs in this action pursuant the New York Rules of Professional Conduct, is denied.

In this action, plaintiff Greens at Half Hollow Home Owners Association, Inc. ("HOA") and plaintiff John DeGregorio, individually and as president of the HOA Board of Directors ("Board") is suing the developer/sponsor of the condominium, as well as several former Board members and the Town of Huntington ("Town") for, among other things, breach of contract, a declaratory judgment,

breach of fiduciary duty, specific performance, and a permanent injunction. The gravamen of this action is plaintiffs' claim that Defendants failed to transfer title to a parcel of land located within the condominium development to the HOA upon completion of the development.

In support of their motion, the Defendants contend, among other things, that defendants Steven Kaplan, Russell Mohr, Joseph Lafferty, and James Kaplan are former clients of HMYKM and that they are now being sued by the Plaintiffs, who are now being represented by HMYKM, regarding the same matters on which HMYKM previously represented them in connection with various legal matters pertaining to the condominium development. HMYKM was retained as general counsel to the HOA in April 2008. At that time and for approximately the next 19 months until their resignation, Steven Kaplan, Mohr, Lafferty and James Kaplan were sponsor-designated members of the Board. Defendants claim that while they were still Board members, HMYKM discussed and advised the Board regarding various legal claims involving the condominium, including the claims interposed in this action.

HMYKM opposes the motion contending, among other things, that Steven Kaplan, Mohr, Lafferty and James Kaplan were never its clients as it was retained as general counsel by the HOA, as indicated in its Retainer Letter. Additionally, HMYKM argues that there is no substantial relationship between its representation of the HOA and the claims asserted in the instant action.

Rule 1.9(a) of New York's Rules of Professional Conduct (22 NYCRR 1200.00), entitled "Duties to Former Client" provides, in relevant part:

"A lawyers who has formerly represented a client in a matter shall not 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 unless the former client gives informed consent, confirmed in writing.

The Appellate Division, Second Department recently stated that:

"[W]here the Rules of Professional Conduct (22 NYCRR 1200.00) are invoked in litigation, courts 'are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake' (*Niesig v. Team I*, 76 N.Y.2d 363, 369-370, 559 N.Y.S.2d 493, 558 N.E.2d 1030; (citation omitted). It is the Supreme Court's responsibility to balance the competing interests, and "[t]he disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court" (*Falk v. Gallo*, 73 A.D.3d 685, 685, 901 N.Y.S.2d 99; (citations omitted).

(*Midwood Chayim Aruchim Dialysis Assocs., Inc. v. Brooklyn Dialysis, LLC*, 82 AD3d 1177,

1178 [2d Dept 2011]).

A party seeking disqualification 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]; *Nationwide Assocs., Inc. v. Targee St. Internal Med. Grp., P.C.*, 303 AD2d 728, 728-729 [2d Dept 2003]).

“A lawyer’s representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual” (*Campbell v. McKeon*, 75 AD3d 479, 480-481 [1st Dept 2010] citing *Polovy v. Duncan*, 269 AD2d 111, 112 [1st Dept. 2000]; *Omansky v. 64 N. Moore Assocs.*, 269 AD2d 336 [1st Dept 2000]; *Talvy v. American Red Cross In Greater N.Y.*, 205 A.D.2d 143, 149, 618 N.Y.S.2d 25 [1st Dept 1994]; *affd.* 87 N.Y.2d 826 [1995]).

Here, although it is undisputed that the interests of the plaintiffs and the moving Defendants in this action are materially adverse, the Defendants have failed to demonstrate the existence of a prior attorney-client relationship between them, individually, and HMYKM. The work HMYKM previously performed was in connection with its representation of the HOA, not the individual Defendants. The Retainer Letter between HMYKM and the HOA specifically addresses “representing The Greens at Half Hollow Home Owners Association, Inc.” and the scope of services set forth therein does not include the representation of individual Board members. The Retainer Letter is signed by Steven Kaplan as President of the HOA, not in his individual capacity. Steven Kaplan’s allegation that HMYKM “would often handle discrete matters for me” is conclusory and wholly-unsupported. The Defendants failed to present specific evidence establishing that HMYKM agreed to or acted as their personal attorneys and HMYKM unequivocally denies any individual representation of the Defendants (*see Campbell v. McKeon, supra*).

The Defendants reliance on this Court’s decision in *Sherbrooke Smithtown Owners Corp. v. Merson* (Index No. 34476-2008 [Sup Ct, Suffolk County, Sept. 30, 2009]), is misplaced as the facts of that case are quite different than the facts of this case. In granting the motion to disqualify in *Sherbrooke*, this Court relied primarily on the fact that a former associate of the law firm representing the plaintiff was a member of the plaintiff’s Board, had retained the law firm as counsel for the Board and allegedly held private, unauthorized and improper Executive Board meeting, excluding another Board member, and the allegation that one of the named partners of the law firm was a fact witness. Thus, this Court exercised its discretion and disqualified the law firm on the ground that the firm was

likely to be a witness and that it had a conflict of interest based upon its prior representation of the Board. By contrast, in this case, there has been no showing that HMYKM should be disqualified under the advocate-witness rule.

Based upon the foregoing, Defendants' motion to disqualify HMYKM from representing plaintiffs is denied.

In any event, even if there exists a prior attorney-client relationship, the Defendants have failed to demonstrate that the matters involved in both representations are substantially related. "In order to meet the 'substantial relationship' test, the issues in the present litigation must be 'identical to' or 'essentially the same' as those in the prior case before disqualification will be granted" (*Lightning Park, Inc. v. Wise Lerman & Katz, P.C.*, 197 AD2d 52, 55 [1st Dept 1994] quoting *Dinger v. Gulino*, 661 F.Supp 438, 444 [EDNY 1987]). Here, neither the Defendants' affidavits nor the minutes of the Board meetings demonstrate that HMYKM discussed or provided legal advice to the HOA Board with regard to the issues raised in the present action, i.e. the Defendants alleged failure to convey title to a parcel of land to the HOA upon completion of the development. The allegations in Defendants' affidavits submitted in support of the motion are vague, non-specific, and not supported by the minutes of the Board meetings provided.

Finally, although disqualification is not warranted, the Court finds that the Defendants' motion has not been made frivolously as a litigation tactic. Accordingly, plaintiffs's request for the imposition of sanctions against Defendants is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 3, 2011
Riverhead, New York


EMILY PINES
J. S. C.

FINAL
 NON FINAL