

Barmash v Perlman

2013 NY Slip Op 32460(U)

October 3, 2013

Sup Ct, New York County

Docket Number: 650417/2013

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

JEAN BARMASH

INDEX NO. 650417/2013

-v-

MOTION DATE

JEFFREY PERLMAN and BRIGHT POWER, INC.

MOTION SEQ. NO. 001

AND ENERGYScoreCARDS, INC. (NOMINAL DEFENDANT)

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion by plaintiff to disqualify the firm of Greenberg Traurig LLP as counsel to defendants is GRANTED per the attached Decision and Order.

A Preliminary Conference is scheduled for 11-25-13 at 2PM at 26 Broadway 10th Floor

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

Dated: October 3, 2013

MELVIN L. SCHWEITZER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Mr. Perlman and Mr. Barmash agreed to found a company, ESC, to commercially exploit the software that Mr. Barmash was developing. In lieu of payment, Mr. Barmash agreed to receive founder's stock in ESC.

Around January 2010, Mr. Perlman secured the software's first customer. On February 10, 2010, ESC was incorporated in Delaware. At the time of incorporation, ESC had two directors, Mr. Barmash and Mr. Perlman. Mr. Perlman acted as ESC's President, Treasurer and Secretary, while Mr. Barmash acted as the company's Chief Technology Officer (CTO). ESC has two shareholders, BP and Mr. Barmash. BP owns approximately 75% of ESC's stock, and Mr. Barmash owns approximately 25%. The software that Mr. Barmash developed is ESC's sole asset and is a trade secret. Around November 2011, Mr. Barmash resigned from his position as CTO at ESC, but continued working on the software as a consultant from January 2012 to June 2012. He also helped groom his successor, who started at ESC in early April 2012. Around September 2012, Mr. Perlman removed Mr. Barmash from ESC's board of directors.

Since 2010, Mr. Perlman and BP have successfully marketed and licensed ESC's software to building owners throughout New York City. Mr. Barmash alleges that ESC has been looted by its controlling shareholder, BP, and the President, Secretary, Treasurer, and Director Mr. Perlman. Furthermore, Mr. Barmash alleges that these parties have misappropriated ESC's intellectual property, and treated it as the property of BP.

Discussion

It is accepted that "[o]ne who has served as an attorney for a corporation may not represent an individual shareholder in a case in which his interests are adverse to other shareholders." *Morris v Morris*, 763 NYS2d 622, 624-25 (2d Dept 2003). Indeed, "[t]he mere appearance that an attorney is representing conflicting interests is sufficient to warrant

disqualification” *Phoenix Elec. Contr. Corp. v New York Tel. Co.*, 155 Misc 2d 250, 251 (Sup Ct 1992). Where a law firm has served as corporate counsel to an entity, it cannot then represent one shareholder against another with regard to underlying corporate transactions concerning that self-same corporate entity. Furthermore, “[a]ny doubts as to the sufficiency of the showing of an asserted conflict of interest are to be resolved in favor of disqualification.” *Lammers v Lammers*, 205 AD2d 432, 433 (1st Dept 1994).

There is considerable evidence that a conflict of interest does exist. First, it is undisputed that Greenburg Traurig has represented, and currently represents, the corporation ESC. Additionally, it is also undisputed that, in addition to representing ESC, Greenburg Traurig also concurrently represents ESC’s majority shareholder, BP. Furthermore, it is undisputed that this action is in relevant part a dispute between two shareholders, ESC and Mr. Barmash, concerning ESC’s corporate governance.

Rule of Professional Conduct 1.13 provides that “[a] lawyer representing an organization may also represent any of its directors, officers . . . [or] shareholders, subject to the provisions of Rule 1.7” NY ST RPC Rule 1.13(d). Rule 1.7 governs conflict of interests with current clients. It states that there is a concurrent conflict of interest if “the representation will involve the lawyer representing differing interests” NY ST RPC Rule 1.7(a)(1). Representing both the corporation and an officer or director charged with breaching fiduciary duties to the corporation involves the lawyer in such a prohibited representation.

In *Campbell v McKeon* (75 AD3d 479 [1st Dept 2010]) the First Department held that as counsel to the company, the law firm “could not also represent [the majority shareholder] in an action in which his interests would be adverse to the [company] . . .” *Id.* at 480. In *Campbell*, a minority member of a limited liability corporation (Campbell) sued the majority member

(McKeon) for fiduciary breaches allegedly committed by the majority member with regard to the LLC, in which both were members. There, as here, one law firm represented both the companies and the majority member. The trial court disqualified the law firm due to its obvious conflict of interest. The law firm appealed and the First Department affirmed the disqualification. In so ruling, the First Department noted that “[c]ounsel for an organizational client is required to act as is reasonably necessary in the best interests of the client when an individual associated with the client may have violated legal duties which are likely to result in substantial injury to the organization.” *Id.*

As there are substantial indicia of a conflict of interest, following the precedent set in *Lammers* and *Campbell*, disqualification is granted. Greenberg Traurig cannot represent the majority shareholder, BP, a director in the corporation, Perlman, and the corporation itself, ESC, as it owes separate duties of loyalty and confidentiality to each. Under Rule 1.7, Greenberg Traurig is disqualified.

Dated: October 3, 2013

ENTER:


J.S.C.

MELVIN L. SCHWEITZER