

Markowits v Friedman
2014 NY Slip Op 30221(U)
January 24, 2014
Sup Ct, Kings County
Docket Number: 502667/2013
Judge: David I. Schmidt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of January, 2014

PRESENT:

HON. DAVID I. SCHMIDT,
Justice.

-----X
SARA MARKOWITS, ALEXANDER MARKOWITS,
PARKSHORE HOME HEALTH CARE, LLC D/B/A
RENAISSANCE HOME HEALTH CARE AND
RENAISSANCE HHA, LLC,

Plaintiffs,

- against -

Index No. 502667/13

BARRY FRIEDMAN, RACHEL FRIEDMAN, ASHER
FENSTERHEIM, ESQ., FAIGY WERTZBERGER,
FRANK CONWAY, SUSAN D. OSTERER,
JOHN AND JANE DOES 1-5,

Defendants.

-----X

The following papers numbered 1 to 23 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Other Papers _____

Papers Numbered

1-4, 5-8, 9-10
11, 12-14, 15-16, 17, 18
19-20, 21, 22, 23

Upon the foregoing papers, plaintiffs Sara Markowits, Alexander Markowits, Parkshore Home Health Care, LLC d/b/a Renaissance Home Health Care (Parkshore) and Renaissance HHA LLC (Renaissance) (collectively, plaintiffs) move, by order to show cause, for an order disqualifying the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP (Abrams Fensterman) from representing any defendant in

this action and for an order compelling Abrams, Fensterman to comply with the subpoena duces tecum served upon it. Plaintiffs further move for an order granting them leave to file an amended complaint. Defendants Barry Friedman, Rachel Friedman, Faigy Wertzberger, Frank Conway and Susan D. Osterer move, by order to show cause, for an order awarding them partial summary judgment dismissing plaintiffs' action as against defendants Wertzberger, Conway, and Osterer. Defendants further move for an order, pursuant to CPLR 7503, staying the balance of this action and compelling arbitration. In a separate order to show cause, plaintiffs move for an order vacating, nunc pro tunc, the Confession of Judgment docketed against plaintiff Alexander Markowits on February 7, 2013 in the office of the County Clerk upon the posting by plaintiffs of a Letter of Credit in a sum directed by the court.

Background Facts and Procedural History

The instant action arises out of a transaction involving the sale of membership interests in certain limited liability companies - namely plaintiffs Parkshore and Renaissance.¹ On March 17, 2010, in order to carry out the sale, defendants Barry and Rachel Friedman entered into a Membership Interest Purchase Agreement (MPA) and separate Membership Interest Put and Call Agreement (MPCA) with plaintiff Alexander Markowits. In this regard, 9.9% of the Friedmans' interest in Parkshore and Renaissance was sold to Markowits pursuant to the MPA while the remaining 90.1% of their interests were conveyed to him pursuant to the MPCA. Among other things, the MPA contained a clause wherein the Friedmans represented that "there are no actions, suits or other

¹Parkshore is a licensed home care services agency that provides care to patients, including help bathing and administering medications, while Renaissance is a licensed home health care agency that provides, among other things, nursing care, medical social work services, and physical therapy.

legal . . . proceedings or governmental investigations pending or threatened against [Parkshore or Renaissance].” The total purchase price of the sale was approximately \$13 million. During the negotiations for the sale, the Friedmans were represented by defendant Asher Fensterheim, Esq. Markowits, in turn, was represented by the law firm of Abrams, Fensterman. Specifically, Markowits’ representation at Abrams Fensterman was handled by Mark Zafrin, Esq. with the assistance of two associates at the firm, Gregg Stoller Esq. and Patti Piccininni Esq. Billing records submitted by plaintiff indicate that approximately 119 hours were billed by Mr. Zafrin in connection with the subject transaction while Mr. Stoller and Ms. Piccininni billed a combined total of 78.5 hours for their work on the sale.

On June 2, 2011, the Friedmans and Markowits entered into a Memorandum Agreement which modified the terms of the MPA and MPCA. Among other things, this Modification Agreement required that Markowits sign a promissory note in the principal sum of \$5,350,000 in favor of the Friedmans. Under the terms of the note, Markowits was to make monthly payments over a 3-year period and the note could be accelerated at the note holder’s option in the event of default. In order to secure the note, Markowits signed a Confession of Judgment which could be filed with the County Clerk in the event of a default. The Modification Agreement also contained a provision stating that “[i]t is understood that Markowits has made his own independent investigation and evaluation of Parkshore and its operation and that the sale is ‘as is’ in all respects.” Finally, in connection with the Modification Agreement, Barry Friedman and Markowits also entered into an arbitration agreement dated May 19, 2011, which provides:

“Barry Friedman and Alexander C. Markowits agree that should any disputes arise between them concerning the sale by Friedman to Markowits of the membership interests of [Parkshore and Renaissance] relating directly or indirectly to the aforementioned transaction, such disputes shall be submitted to arbitration before [Rabbi] Chaim Kohn Rov Khal Gur Flatbush

(‘Beth Din’) for determination pursuant to the rules and procedures of the Beth Din. The rulings and awards of the Beth Din shall be binding on the parties and shall be subject to confirmation pursuant to Article 75 of the CPLR. The agreement to submit their disputes to arbitration as aforementioned shall not preclude the filing and entering by Friedman in the appropriate Court of the Confession of Judgment being signed by Markowits in favor of Friedman.”

At the time the 2011 Modification Agreement and arbitration agreement were entered into, Markowits was no longer represented by Abrams Fensterman. In particular, such representation had ceased in or around July 2010, when Mr. Zafrin left the firm.

On February 29, 2012, the parties entered into a letter agreement which modified the payment schedule of the promissory note. In particular, Markowits agreed to make a partial pre-payment on the note in the amount of \$2 million, with the remaining balance due on the maturity date. Under the terms of the agreement, Markowits was to make an initial payment of \$1.5 million toward the pre-payment within 5 business days and the remaining \$500,000 was to be paid in four equal consecutive monthly installments on the 15th day of each month, commencing March 15, 2012.

On July 13, 2012, the Friedmans notified Markowits that he was in default under the terms of the note and that they were exercising their option to accelerate. In or around February 2013, the Friedmans filed the Confession of Judgment with the County Clerk and sent Markowits notice of entry of judgment.

By summons and complaint dated May 20, 2013, plaintiffs commenced the instant action against defendants. The complaint contained 22 separate causes of action alleging, among other things:

- That at the time the parties entered into the MPA, MPCA, and 2011 modification agreement, medicaid fraud investigations were being conducted by state and federal authorities regarding Parkshore and Renaissance’s conduct

during the period of 2005 through 2007. The complaint further alleges that at the time these agreements were entered into, whistleblower (Qui Tam) actions had been filed in federal and state court under seal naming Parkshore and Renaissance as defendants and seeking redress. According to the complaint, the Friedmans were fully aware of these investigations and lawsuits but they withheld this information from Alexander Markowits and thereby breached the terms of the MPA, MPCA, and the 2011 Modification agreements (1st cause of action).

-That Alexander Markowits is entitled to a judgment directing Friedman to pay him for the sums he paid pursuant to the settlement of the Qui Tam actions (2nd cause of action).

-That the Friedmans and their attorney Asher Fensterheim fraudulently induced Alexander Markowits to enter into the MPA, MPCA, and 2011 Modification Agreement and that agreements were procured under false pretenses inasmuch as the Friedmans misrepresented that they were the sole owners of Parkshore and Renaissance and they also failed to disclose to Markowits the existence Qui Tam actions (4th cause of action).

-That the Friedmans violated the non-compete clause of the MPA and further violated the terms of the MPA by soliciting and hiring Parkshore and Renaissance employees (5th and 6th causes of action).

- That defendants Faigy Wertzberger and Frank Conway were employed by Parkshore and Renaissance and they violated the terms of their employment agreements by using confidential information obtained from their employment to solicit patients (9th cause of action).

- That Alexander Markowits did not authorize the notary defendant Susan D. Osterer to notarize his signature on the Confession of Judgment and the filing of the notarized Confession of Judgment was done to deceive the court and has negatively impacted the ownership interests of plaintiff Sara Markowits respecting properties jointly owned by Sara and Alexander Markowits. Accordingly, the complaint seeks to vacate the Confession of Judgment (13th cause of action).
- That the Confession of Judgment in the amount of \$5.3 million filed with the clerk fails to account for the fact that the judgment had been reduced by \$1.9 million as the result of a payment and defendant Fensterheim violated Judiciary Law § 487 by submitting an affirmation in connection with the Confession of Judgment which failed to acknowledge the payments made (14th cause of action).
- That the Confession of Judgment is facially defective inasmuch as it failed to indicate the reduction in the amount owed and failed to attach a copy of the promissory note to the Confession of Judgment (15th and 16th causes of action).
- That Markowits is entitled to indemnification under the terms of the MPA and MPCA (21st cause of action).
- That the Friedmans are entitled to a judgment declaring that they are not in default under the MPA, MPCA, and 2011 Modification Agreement and for an order declaring that the Confession of Judgment is null and void and directing the clerk to vacate the Confession of Judgment nunc pro tunc (22nd cause of action).

By order to show cause dated May 24, 2013, plaintiffs moved for an order vacating the Confession of Judgment as well as granting certain injunctive relief precluding the Friedmans from employing any persons employed by Parkshore and/or Renaissance. While that motion was pending, plaintiffs made the instant motion to disqualify Abrams Fensterman, for leave to amend the complaint, and for an order compelling compliance with a subpoena duces tecum. Further, defendants made the instant motion for partial summary judgment and for an order compelling arbitration. In a partial decision and order dated September 13, 2013, this court denied plaintiffs' motion to vacate the Confession of Judgment. However, the court directed defendants to file a partial satisfaction of the judgment in the amount of \$1.9 million given the undisputed fact that the filed Confession of Judgment did not reflect a payment made by Mr. Markowits in this amount.² The court further noted that plaintiffs improperly raised in reply papers the argument that the Confession of Judgment should be vacated because they were fraudulently induced into entering the transaction and that plaintiffs' claim of fraudulent inducement was more properly addressed in the context of defendants' pending motion to compel arbitration. The instant motions are now before the court.

Plaintiffs' Motion to Disqualify

Plaintiffs move for an order disqualifying Abrams Fensterman from representing any defendant in this action. In support of this motion, plaintiffs submit an affidavit by Alexander Markowits in which he states that he hired Abrams Fensterman in or about November 2009 to represent him in connection with the purchase of Parkshore and Renaissance from the Friedmans. Mr. Markowits further states that Abrams Fensterman

²On October 17, 2013, defendants filed a partial satisfaction of judgment with the clerk in accordance with the court's directive.

negotiated the terms of the purchase on his behalf, drafted the MPA and MPCA, and advised him during the process. In addition, Mr. Markowits points out that Abrams Fensterman billed him over \$37,000 for these legal services. Finally, Mr. Markowits states that he has not consented to Abrams Fensterman's representation of the defendants in the instant action. According to plaintiffs, Abrams Fensterman's representation of the defendants in this action violates Rule 1.9 (b) of the Rules of Professional Conduct, which precludes a lawyer who has formerly represented a client in a matter from thereafter representing another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client. In this regard, plaintiffs note that Mr. Stoller and Ms. Piccininni, both of whom are still employed with Abrams Fensterman, worked extensively on the MPA and MPCA agreements which form the very basis for the instant litigation. Plaintiffs maintain that this prior involvement is substantially related to the instant action inasmuch as the non-solicitation, non-compete and indemnification clauses in the MPA and MPCA, which were negotiated and drafted by Abrams Fensterman, directly relate to several causes of action in the complaint. In particular, plaintiffs aver that the resolution of these claims will be dependent upon the interpretation of these clauses in the MPA and MPCA agreements.

In further support of their motion, plaintiffs contend that Abrams Fensterman should be disqualified as Mr. Stoller and Ms. Piccininni will likely be called as fact witnesses in this case. In particular, plaintiffs aver that, inasmuch as the interpretation of the non-compete, non-solicitation and indemnification clauses drafted by Abrams Fensterman is a major issue in this case, the testimony of Mr. Stoller and Ms. Piccininni will be necessary since they are the only parties other than plaintiffs and defendants with knowledge of the discussions and intentions of plaintiff regarding the agreements.

In opposition to plaintiffs' motion to disqualify, defendants maintain that plaintiffs have failed to demonstrate that Abrams Fensterman's prior representation of Mr. Markowits is substantially related to the instant action. In particular, defendants note that the majority of plaintiffs' claims concern the 2011 Modification Agreement as well as the Confession of Judgment, both of which were negotiated and executed long after Abrams Fensterman's representation of Mr. Markowits had ceased. Further, defendants maintain that there is no issue regarding the terms, meaning or interpretation of the non-compete, non-solicitation, and indemnification provisions in the MPA and MPCA. Rather, the only issues are whether or not these provisions were subsequently violated or triggered, which revolves around factual questions unrelated to any work performed by Abrams Fensterman in negotiating and drafting these provisions. In any event, defendants aver that Mr. Zafrin was the main contact person who dealt and communicated directly with Markowits, and who directed and supervised the work done by his associates. According to defendants, Mr. Stoller and Ms. Piccininni performed perfunctory tasks with respect to the preparation of the transactional documents and merely acted as scribes at the direction of Mr. Zafrin. In support of this contention, defendants submit affidavits by Mr. Stoller and Ms. Piccininni in which they state that their involvement with Abrams Fensterman's prior representation of Markowits was limited to helping draft the transaction documents in connection with his purchase of Parkshore and Renaissance. Mr. Stoller and Ms. Piccininni also state that they had minimal contact and communications with Mr. Markowits and that they do not possess any confidential information or secrets imparted by Markowits.

In further opposition to plaintiffs' motion to disqualify, defendants argue that plaintiffs waived any objection they might have had to Abrams Fensterman's representation of defendants in this matter due to their delay in making the instant motion and based upon

plaintiffs' participation in certain settlement negotiations while the motion to disqualify was pending.³

It is well-settled that the disqualification of an attorney is a matter that rests within the sound discretion of the court (*Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 550 [2013]). Further, “[a] party’s entitlement to be represented in ongoing litigation by counsel of [its] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted” (*Matter of Dream Weaver, Realty, Inc. [Portizky-DeName]*, 70 AD3d 941, 943 [2010]). Thus, “[t]he burden is on the party moving for disqualification . . . to 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” (*Medical Capital Corp. v MRI Global Imaging, Inc.*, 27 AD3d 427, 428 [2006]). “[W]here the movant satisfies all three inquires . . . the irrebuttable presumption of disqualification arise(s)” as to the attorney in question (*Takni-Plex, Inc., v Meyner & Landis*, 89 NY2d 123, 132 [1996]). Further, once an irrebuttable presumption of disqualification arises as to one attorney at a law firm, all of the attorneys at that firm are precluded from representation unless proof is submitted which demonstrates that “any information acquired by the disqualified lawyer is unlikely to be significant or material in the [subject litigation]” (*Kassis v Teacher’s Ins. & Annuity Assn.*, 93 NY2d 611, 617 [1999]). Moreover, “[p]roof must also be presented that the law firm properly screened the disqualified lawyer from dissemination and receipt of information subject to the attorney-client privilege” (*Matter of Town of Oyster Bay*, 109 AD3d at 551).

³This particular argument was raised by defendants at oral argument.

It is undisputed that a prior attorney-client relationship existed between Markowits and current Abrams Fensterman attorneys, Mr. Stoller and Ms. Piccininni. It is also undisputed that the interests of Abrams Fensterman's present clients (i.e., the defendants in this action) are materially adverse to Mr. Markowits' interests. Thus, the issue before the court is whether or not the issues involved in the two representations are substantially related. Such a relationship exists where there is a "substantial relationship between the issues in the [instant] litigation and the subject matter of the prior representation, or where counsel had access to confidential material subsequently related to the litigation" (*Nesenoff v Dinerstein & Lesser, P.C.*, 12 AD3d 427, 428-429 [2004]). Stated otherwise, there must be a "sufficient nexus" between the prior representation and the action presently before the court (*Falk v Chittenden*, 11 NY3d 73, 78 [2008]).

Here, plaintiffs have met their burden of establishing that there was a substantial relationship between Mr. Stoller and Ms. Piccininni's former representation of Markowits and the present action so as to require their disqualification in this matter. In particular, it is undisputed that between January 27, 2010 and July of 2010, Mr. Stoller and Ms. Piccininni billed Markowits a combined total of 78.5 hours for legal services directly related to the negotiation and drafting of the MPA and MPCA agreements whereby Markowits purchased the Friedmans' membership interests in Parkshore and Renaissance. These agreements and this transaction lie at the core of the instant action. Moreover, several of the causes of action alleged in the complaint relate directly to clauses in the two agreements which Mr. Stoller and Ms. Piccininni's helped to negotiate and draft. For example, as previously noted, the MPA contains a clause wherein the Friedmans represented that "there are no actions, suits or other legal . . . proceedings or governmental investigations pending or threatened against [Parkshore and Renaissance]." This clause, which Ms. Stoller and Ms. Piccininni helped to

negotiate and draft for the protection of their former client Markowits, now forms that basis for plaintiffs' breach of contract claim against the Friedmans in the instant litigation. Further, the presence of this clause in the MPA, including the circumstances under which it was negotiated, could have implications with respect to plaintiffs' proposed fraudulent inducement claim. The court also notes that both Mr. Stoller and Ms. Piccininni directly communicated with Markowits during the course of their prior representation. Finally, that Mr. Stoller and Ms. Piccininni's representation of Markowits in connection with the MPA and the MPCA was merely supportive of Abrams Fensterman's lead attorney, Mr. Zafrin, has no bearing on the question of whether the work they did perform was substantially related to the instant action.

Having determined that Mr. Stoller and Ms. Piccininni are disqualified from representing defendants in this case, the court must next determine whether or not this disqualification must extend to the entire law firm of Abrams Fensterman. As noted above, in order to rebut the presumption that the entire firm must be disqualified, it is incumbent upon defendants to demonstrate that any information acquired by Mr. Stoller and Ms. Piccininni in the former representation is unlikely to be significant or material in the instant litigation. Further, proof must be submitted that Abrams Fensterman properly screened the disqualified lawyers from dissemination and receipt of information subject to the attorney-client privilege.

Here, Mr. Stoller and Ms. Piccininni's affidavits are arguably sufficient to demonstrate that information that they acquired in their prior representation of Mr. Markowits is unlikely to be significant or material in the instant litigation. In particular, these affidavits indicate that Mr. Stoller and Ms. Piccininni played a supporting role to Mr. Zafrin with respect to the MPA and MPCA, and that their contact with Mr. Markowits

was limited. However, as the Court of Appeals made clear in *Kassis*, this alone is insufficient to rebut the presumption of disqualification. In particular:

“[d]emonstrating that no significant client confidences were acquired by the disqualified attorney, however, does not wholly remove the imputation of disqualification from a law firm. Because even the appearance of impropriety must be eliminated, it follows that even where it is demonstrated that the disqualified attorney possess no material confidential information, a firm must nonetheless erect adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation” (*Kassis*, 93 NY2d at 618).

Here, defendants have failed to present any proof that Abrams Fensterman took precautions to screen Mr. Stoller and Ms. Piccininni through the implementation of a so-called “Chinese Wall” so as to prevent the improper dissemination and receipt of information subject to the attorney-client privilege. In fact, given defendants’ silence on the matter, it seems clear that no screening measures were implemented.

As a final matter, there is no merit to defendants’ argument that plaintiffs waived any objections they might have had to Abrams Fensterman’s representation of defendants in this matter. In this regard, “[i]f a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party’s representation” (*Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692, 693-694 [2013]). Here, plaintiffs promptly raised the conflict of interest issue upon learning of Abrams Fensterman’s representation of defendants. In particular, plaintiffs’ agreement to participate in settlement conference prior to moving to disqualify did not constitute the type of substantial and/or prejudicial delay so as to constitute a waiver.

Under the circumstances, that branch of plaintiffs’ motion which seeks an order disqualifying the law firm of Abrams Fensterman from representing the defendants in this

action is granted. Pursuant to CPLR 321 (c), this action is stayed for a period of 30 days from the date of personal service of a copy of this order with notice of entry on defendants to afford them an opportunity to retain new counsel. All other pending motions by the parties are held in abeyance pending retention of new counsel.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. DAVID I. SCHMIDT

1/24/14

Enter Foeth

HON. DAVID I. SCHMIDT

FILED

JAN 24 2014

KINGS COUNTY CLERK'S OFFICE