

Hunzinger v Costello
2014 NY Slip Op 30267(U)
January 27, 2014
Supreme Court, New York County
Docket Number: 653086/12
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING Justice J.S.C.

PART 48

Veronica Humzinger
-v.
Carol Costello

INDEX NO. 653086/12
MOTION DATE
MOTION SEQ. NO. 001

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 is

Motion decided in accordance w/ the
accompanying memorandum decision/
order of this court.

Scanned to New York EF on 1/27/14

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

Dated: 1/27/14

JEFFREY K. OING 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

VERONICA HUNZINGER, individually and
derivatively on behalf of PLAID, INC.,

Plaintiff,

-against-

CAROL COSTELLO,

Defendant.

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**Mtn Seq. Nos. 001 &
002**

-----x

JEFFREY K. OING, J.:

In motion sequence no. 001, defendant, Carol Costello,
moves, pursuant to CPLR, for an order dismissing the verified
complaint.

Plaintiff, Veronica Hunzinger, individually and derivatively
on behalf of Plaid, Inc. ("Plaid"), cross-moves, pursuant to CPLR
3025(b), to amend the verified complaint.

In motion sequence no. 002, plaintiff moves to disqualify
defendant's counsel, David Gordon ("Gordon").

Motion sequence nos. 001 and 002 are consolidated for
disposition.

Background

In August 2005, plaintiff was laid off from her job at Wolff
Olins. Based on the advice of defendant, a Wolff Olins
colleague, plaintiff hired defendant's personal attorney, Gordon,
to represent her in the termination of her employment with Wolff

Olins, and the "formation of a new business entity" that became Plaid. Plaintiff signed a retainer and engagement letter, dated September 12, 2005, that contained the following waiver:

should a conflict of interest arise between you and Carol Costello [defendant] or between you and any entity in which Ms. Costello [defendant] has a majority or controlling interest, we will not be able to represent you and you will need to retain other counsel. You agree that we may represent Ms. Costello [defendant] and the foregoing entity in the event of a conflict of interest. At this juncture, we are unaware of any such conflict of interest.

(Id.). Plaid was organized on September 14, 2005.

Defendant joined Plaid on or about October 17, 2005. Upon joining Plaid, defendant received a majority interest of fifty-five percent of Plaid's shares while plaintiff retained the remaining forty-five percent. Plaintiff alleges that she conditioned this grant on an agreement between defendant and her that they would be officers, directors, and employees of Plaid for as long as they "owned the company together", and that they would share in annual distributions of earnings (Hunzinger 12/10/12 Aff., ¶ 3). According to plaintiff, they further agreed that defendant and plaintiff would make all major business decisions together, including decisions about "annual earnings ... which clients to take ... billing, corporate expenses, office lease, insurance, hiring professionals, such as corporate accountants and lawyers, hiring third party vendors, and hiring

and firing employees" (Id.). Plaintiff also alleges that defendant agreed to have "a written shareholder agreement ... drafted and executed to memorialize" this agreement, and that she granted defendant fifty-five percent of Plaid's shares based on the assumption that such an agreement would be written (Id.).

On May 16, 2006, defendant, plaintiff, and Gordon signed a conflict waiver in anticipation of Gordon preparing a shareholders' agreement (Hunzinger 1/22/13 Aff., Ex. 5). This waiver, drafted by Gordon's firm, stated:

We have been asked by both of you to advise and represent you in connection with the preparation of a shareholders' agreement relating to Plaid, Inc.

The representation of the two parties presents a conflict of interest. Both clients may consent to the representation if we believe that we can provide diligent representation to each of you, and you consent to the representation under the circumstances after being duly informed about the material risks involved and the alternatives available. Based on the facts presented by each of you, we believe that we would be able to provide the representation requested.

We note the following material risks:

1. Information relating to the representation of either client may be revealed to the other if such information is relevant to the representation.
2. Advice to one client may be disadvantageous to the other.
3. We will not be able to represent either of you in the assertion of a claim against the other.
4. In the course of the representation, either of you, at any time, may withdraw consent to the waiver of

any conflict, and we would resign the representation of both.

5. If at any time during the course of the representation, we believe that our ability to diligently represent both clients simultaneously is compromised, then we will have the right to withdraw from the representation of both clients.

(Id.). Plaintiff and defendant consented; no shareholder's agreement was ever signed.

Relations between plaintiff and defendant deteriorated and, in or around July 2009, defendant terminated plaintiff's employment with Plaid and removed her as Plaid's director and officer (Hunzinger 1/22/13 Aff., ¶ 1). Plaintiff commenced this action on September 3, 2012. On January 25, 2013, plaintiff moved to disqualify Gordon as Costello's counsel.

Discussion

I. Motion to Dismiss/Cross-Motion to Amend (mtn seq. no. 001)

In the interest of judicial economy, plaintiff's cross-motion to amend her complaint will be addressed first. In her proposed amended verified complaint, plaintiff asserts five causes of action against defendant. Defendant objects only to the proposed third cause of action, for breach of contract.

While "leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay", the First Department has consistently held that "in order to conserve

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judicial resources, an examination of the underlying merits of the proposed causes of action is warranted and leave to amend will be denied where the proposed pleading fails to state a cause of action" (Board of Mgrs. of Alexandria Condominium v Broadway/72d Assocs., 285 AD2d 422, 423-24 [1st Dept 2001]). As the party seeking amendment, plaintiff must demonstrate that the proposed amendment is meritorious (Hynes v Start Elevator, Inc., 2 AD3d 178, 181 [1st Dept 2003]).

To establish a breach of contract, plaintiff must show the existence of a contract, plaintiff's performance under the contract, defendant's breach of the contract, and damages resulting from that breach (Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]).

Here, plaintiff alleges that she had an oral agreement with defendant for them to serve as Plaid's officers and directors, make all major business decisions together, and share in the profits of the corporation, that she performed under their agreement, and that defendant breached the agreement by removing plaintiff from the company.

Defendant does not assert that the proposed third cause of action would be surprising or prejudicial, but, instead, claims that the alleged oral agreement is void under Business Corporation Law ("BCL") § 620(a) and the statute of frauds.

A. BCL § 620(a)

Section 620(a) requires that shareholder voting agreements will only be valid and enforceable if they are in writing and signed by the parties to the agreement (Shea v Hambro Am. Inc., 200 AD2d 371, 372 [1st Dept 1994][emphasis added]). In that regard, defendant argues that this oral agreement was a shareholder voting agreement because it deprived Costello of her majority voting rights by preventing her from acting without plaintiff's approval. Thus, absent a writing, defendant argues that the alleged oral agreement is invalid.

Contrary to defendant's argument, the alleged oral agreement extended far beyond defendant's and plaintiff's voting activities as shareholders. It purportedly regulated their roles as officers, directors, and employees of the corporation (Hunzinger 12/10/12 Aff., ¶ 3). Given the breadth of this alleged oral agreement, section 620(a)'s requirement that voting agreements must be in writing is inapplicable to this present claim.

B. Statute of Frauds

Defendant next argues that the alleged oral agreement was indefinite, and, as a result, is invalid under the statute of frauds. The statute of frauds requires that "an agreement, promise or undertaking [that] by its terms is not to be performed within one year from the making thereof" must be in writing (N.Y.

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Gen. Oblig. Law § 5-701[a][1]). A contract of indefinite duration falls within the statute of frauds (Zimmer-Masiello, Inc. v Zimmer, Inc., 159 AD2d 363 [1st Dept 1990]). In determining whether a contract is indefinite, "[t]he question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year" (D & N Boening, Inc. v Kirsch Beverages, Inc., 63 NY2d 449, 454 [1984]). Where "one or both parties have ... an explicit option to terminate their agreement within one year, that agreement is, by its own terms, capable of completion within that period" and is not governed by the statute of frauds (Id. at 456).

Defendant argues that the alleged oral agreement was indefinite because it required that she and plaintiff remain officers, directors and employees of Plaid for as long as they "owned the company together". Neither party, however, claims that the alleged oral agreement restrained plaintiff or defendant from giving up their ownership in Plaid at any time by selling their shares in Plaid and quitting the company. Therefore, either party could terminate the alleged oral agreement within one year without any consequence. Under these circumstances, this alleged oral agreement is not indefinite for purposes of the

statute of frauds (North Shore Bottling Co. v Schmidt & Sons, Inc., 22 NY2d 171 [1968] [oral agreement establishing plaintiff as the defendant's exclusive wholesale distributor in Queens County for as long as defendant sold beer in the New York metropolitan area was outside the statute of frauds because defendant was allowed to end the agreement at any time by discontinuing its sales of beer in the New York area]).

Because the alleged oral agreement at issue here does not violate section 620(a) or the statute of frauds, and there is no claim that the proposed amendment would be prejudicial or surprising to defendant, plaintiff's cross-motion to amend her verified complaint is granted. Defendant's motion to dismiss the original verified complaint is denied as moot and without prejudice to renewal as to the amended verified complaint.

II. Motion to Disqualify Counsel (mtn seq. no. 002)

Plaintiff seeks to have Gordon disqualified as defendant's attorney by arguing that he has breached his ethical duty to plaintiff as a former client and as a shareholder of Gordon's current client, Plaid (Hunzinger 1/22/13 Aff., ¶ 17). Specifically, she claims that Gordon has violated sections 1.9, 1.7 and 3.7 of the New York Rules of Professional Conduct ("RPC").

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The record demonstrates that plaintiff filed a complaint against Gordon with the Appellate Division, First Department's Departmental Disciplinary Committee on August 18, 2009. In a correspondence to plaintiff dated July 11, 2011, the Departmental Disciplinary Committee advised plaintiff that after conducting an investigation into the matter it found "insufficient evidence to prove that Mr. Gordon engaged in an impermissible conflict of interest ... by continuing to represent Carol Costello and Plaid, Inc. regarding various post-employment disputes between you and Ms. Costello and/or Plaid, Inc." (Hunzinger 1/22/13 Aff., Ex. 9).

Although the issues and facts before the Departmental Disciplinary Committee are virtually identical to the present dispute herein, there is one critical difference -- plaintiff seeks Gordon's disqualification based on his current representation of defendant in this action, which was not considered by the disciplinary proceeding in resolving the alleged conflicts issue. Accordingly, review of the alleged conflicts issue must be conducted again.

The party seeking disqualification "bears the burden of establishing that such a drastic remedy is warranted" (O'Donnell, Fox & Gartner, P.C. v R-2000 Corp., 198 AD2d 154 [1st Dept 1993]; NYK Line (N. Am.) Inc. v Mitsubishi Bank, Ltd., 171 AD2d 486, 488 [1st Dept 1991]). This burden is particularly high where the

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moving party has delayed unnecessarily in bringing the disqualification motion because "inordinate delay in moving for such relief is an indication that the motion has been made to gain a tactical advantage in the litigation, or for purposes of delay" (Saint Barnabas Hosp. v New York City Health & Hosps. Corp., 7 AD3d 83, 94-95 [1st Dept 2004]).

Plaintiff waited nearly six months after commencing this action to move to disqualify Gordon. Such a delay is inexplicably inordinate, particularly given plaintiff's and Gordon's alleged prior attorney-client relationship. Nonetheless, plaintiff maintains that Gordon violated RPC 1.9, which prohibits a lawyer who represented a former client in one matter from subsequently representing another client in the same or a substantially related matter in which "that [new client's] interests are materially adverse to the interests of the former client" unless "the former client gives informed consent, confirmed in writing".

An "irrebuttable presumption of disqualification" arises if a party can establish: 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

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client and former client are materially adverse (Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 131 [1996]).

Although an attorney-client relationship existed between Gordon and plaintiff, she has failed to establish that Gordon's representation was substantially related to the present controversy. To establish a "substantial relationship," the issues in the present litigation must be either identical to or "essentially the same" as those in the prior representation (Lightning Park, Inc. v Wise Lerman & Katz, P.C., 197 AD2d 52, 55 [1st Dept 1994]).

Plaintiff claims that "Gordon previously represented Hunzinger in all of the events that are now the subject of this action" (Ptf. Memo. of Law, Motion to Disqualify at pg. 6). Contrary to plaintiff's assertion, the issues presented in this action -- whether defendant breached her fiduciary duty through self-dealing and corporate waste, or breached her alleged oral agreement with plaintiff -- are clearly unrelated to Gordon's initial representation of plaintiff in her employment termination with Wolff Olins and forming Plaid.

Furthermore, even if these matters were substantially related, plaintiff expressly consented to Gordon's representation of defendant. The retainer agreement Gordon and plaintiff executed in September 2005 included a conflict waiver permitting

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Gordon to represent defendant, or any entity in which she had a majority or controlling interest, in a subsequent conflict with plaintiff, which is the precise circumstance here (Saint Barnabas Hosp., 7 AD3d at 92, supra).

Plaintiff claims, however, that her consent to the representation was not informed because "Gordon never told [her] the myriad risks of ceding a majority interest in Plaid to Costello" (Ptf. Memo. of Law at pg. 6). In particular, she asserts that she asked Gordon about the risks posed by defendant's refusal to commit their agreement to writing, and Gordon failed to advise her that without such an agreement Costello would be able to contravene their oral agreement (Hunzinger 1/22/13 Aff., ¶ 5). Plaintiff's argument is unavailing.

Defendant and Gordon maintain that defendant and plaintiff negotiated the terms of their business relationship relating to Plaid independent of Gordon (Gordon Affirm., ¶¶ 9-11), and defendant asserts that she expressly informed plaintiff that she wanted a majority of the shares to ensure that she would have final say over all business decisions (Costello 10/7/09 Aff., ¶ 6). Such assertions have merit because they are corroborated by plaintiff's own allegations in her verified complaint and amended verified complaint. There, plaintiff alleges that she granted

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defendant a majority interest in Plaid before she incorporated Plaid without Gordon's input, and that this decision was made before she signed the September 2005 conflicts waiver (Verified Complaint, ¶ 12; Amended Verified Complaint, ¶ 1). Thus, there was no failure on Gordon's part to warn plaintiff of a future controversy when such advice was outside the scope of his representation.

Additionally, to the extent that plaintiff argues that the second conflict waiver she signed with Gordon and Costello, which stated that Gordon would not be able to represent one in the assertion of a claim against the other, prevents Gordon from representing Costello in this action, the second waiver's restrictions are limited to issues arising out of the shareholder's agreement. Given that no written shareholder agreement was ever executed, the second conflict waiver does not prevent Gordon from representing defendant.

Plaintiff also argues that Gordon should be disqualified under RPC 1.7(a), which prohibits a representation involving "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal". Plaintiff claims that such a conflict exists because she is a shareholder of Plaid and Gordon is Plaid's attorney. Again, plaintiff's argument is unavailing.

In a derivative suit, such as the present action, the corporation is usually a "passive" litigant and does not ordinarily require separate representation by independent counsel, particularly where the representation of the corporation is "nominal" (207 Second Ave. Realty Corp. v Salzman & Salzman, 291 AD2d 243 [1st Dept 2002]). A representation is nominal where "the outcome of the derivative action would have been exactly the same had the law firm purported to represent only the individual defendants therein and not the nominal corporate defendant" (Id.). Here, Plaid remains a passive litigant, as no appearance and answer is required of Plaid, and the outcome of the derivative action would be the same were Gordon to represent only the individual defendant.

In addition, where, as here, the defendant shareholder is also the corporation's controlling shareholder, an attorney may represent both the corporation and the non-petitioning shareholder who runs the corporation's day-to-day operations, (compare Ferolito v Vultaggio, 99 AD3d 19 [1st Dept 2012] [disinterested lawyer could objectively believe that law firm could adequately represent both close corporation and non-petitioning shareholder who ran corporation's day-to-day operations with respect to which of the two, if any, would exercise statutory election right to buy out shares of

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petitioning shareholder seeking judicial dissolution of corporation] with Chang v Chang, 190 AD2d 311, 316 [1st Dept 1993] [attorney irreparably tainted proceedings by representing clients and corporation where complaint charged attorney with acts in furtherance of a scheme to defraud and loot the corporation]).

None of the cases plaintiff cites require an alternative conclusion. Feygin v Martell involved the disqualification of an attorney representing the defendant when the plaintiff and the defendant shared a joint strategy in substantially related prior litigation during which attorney "became the recipient of plaintiff's litigation-related confidences" (283 AD2d 304 [1st Dept 2001]). In this action, there was no prior litigation in which the parties were on the same side, and plaintiff presents no evidence that Gordon holds plaintiff's confidences. Every case plaintiff relies on involves attorneys who formerly represented the corporation before bringing suit against that corporation, the opposite of the situation here (Matter of Greenberg, 206 AD2d 963 [4th Dept 1994]; Mancheski v Gabelli Grp. Capital Partners, Inc., 22 AD3d 532 [2d Dept 2005]; Fleet v Pulsar Const. Corp., 143 AD2d 187 [2d Dept 1988]), or engaged in misconduct related to the suit (Morris v Morris, 306 AD2d 449 [2d Dept 2003] [firm that had served as corporation's counsel should

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have been disqualified from representing corporation's founder in shareholder's derivative action alleging that founder misappropriated funds for personal use where the firm in question had provided services in connection with transactions underlying derivative claims]; Schmidt v Magnetic Head Corp., 101 AD2d 268 [2d Dept 1984] [disqualification of attorney in derivative action was appropriate where the attorney acquired a proprietary interest in the subject matter of the litigation]). Here, plaintiff does not allege that Gordon aided defendant in the alleged diversion of corporate assets or acted unlawfully in removing plaintiff as a director and officer. As a result, Gordon's continued representation of defendant and Plaid does not violate RPC 1.7.

Finally, Hunzinger argues that Gordon should be disqualified under RPC 3.7(a), which provides that, with a few exceptions, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact". A "mere possibility that the attorney may be called to testify, as alleged by the plaintiff, is an inadequate excuse to justify disqualification, particularly where ... [the testimony] would be merely cumulative" (O'Donnell, Fox & Gartner, P.C. v R-2000 Corp., 198 AD2d 154, 155 [1st Dept 1993]). Rather, disqualification may be required only when such

testimony is necessary. Whether certain testimony is necessary is determined by "such factors as the ... weight of the testimony, and availability of other evidence" (S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 445-46 [1987] [citations omitted]).

Based on RPC 3.7(a), plaintiff argues that Gordon cannot remain as defendant's attorney because he "was present when Plaid was formed and organized" and witnessed the parties' "initial agreements as to structure, division of shares and employment of the parties as officers of the company[,] negotiations and agreements regarding formalization of their verbal shareholder agreement in a written document", as well as defendant's "removal of Hunzinger as an officer and director [and her] refusal to share distributions based on Hunzinger's interest in the company" (Ptf. Memo. of Law, Motion to Disqualify at pg. 8). Even if these allegations were true, plaintiff has failed to demonstrate that Gordon would be a necessary witness at trial, as she does not claim that defendant and she are not available to testify to any of the relevant facts. Therefore, RPC 3.7 does not require Gordon's disqualification at this time, and plaintiff's motion to disqualify Gordon is denied without prejudice.

Accordingly, it is

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ORDERED that plaintiff's cross-motion for leave to amend the verified complaint herein is granted, and the amended verified complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant's motion to dismiss the original verified complaint is denied as moot, without prejudice with respect to the amended verified complaint; and it is further

ORDERED that the defendant shall serve an answer or move with respect to the amended verified complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further


ORDERED that plaintiff's motion to disqualify defendant's counsel is denied; and it is further

ORDERED that defendant's request for sanctions is denied, and it is further

ORDERED that counsel are directed to contact the Clerk of Part 48 at 646-386-3265 to schedule a preliminary conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/27/14



HON. JEFFREY K. OING, J.S.C.