

Villano v Villano

2014 NY Slip Op 31025(U)

April 16, 2014

Sup Ct, Suffolk County

Docket Number: 29422-2011

Judge: Emily Pines

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

*Present:*HON. EMILY PINES

J. S. C.

Motion Date: 01-13-2014**Submit Date:** 01-14-2014**Motion No.:** 004 MOTD

_____ X
**THOMAS VILLANO, as a Shareholder of
One Source Tool Supply, Inc., and in the right
of One Source Tool Supply, Inc.,**

Plaintiff,**-against-**

**WILLIAM A. VILLANO, EILEEN VILLANO,
and ONE SOURCE TOOL SUPPLY, INC.,**

Defendants.

_____ X

Attorney for Plaintiff

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Attorney for Defendants

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ORDERED that the motion (004) by plaintiff Thomas Villano for leave to reargue the motion that resulted in an order of this Court, dated November 12, 2013, which granted its motion, in part, to disqualify Mr. Dunewood Truglia, Esq. as counsel for the corporate defendant is granted; and it is further

ORDERED that upon reargument, the branch of the motion to disqualify Mr. Dunewood Truglia as counsel for defendants William Villano and Eileen Villano is denied; and it is further

ORDERED that counsel for the movant shall serve a copy of the Order with Notice of Entry upon counsel for the defendants, pursuant to CPLR 2103 (b) (1), (2) or (3) within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

ORDERED that the parties are directed to appear at a compliance conference in IAS Part 46 on May 15, 2014 at 11:00 a.m. before the undersigned.

In this shareholder's derivative action, the plaintiff Thomas Villano seeks damages and other relief on behalf of the defendant One Source Tool Supply, Inc. (hereinafter referred to as "the corporation") for alleged conversion of corporate assets by the defendants Eileen Villano and William A. Villano (hereinafter referred to as "the Villano defendants"). The record reveals that the plaintiff owns 20% of the shares in the corporation and the defendants Eileen Villano and William Villano each own 40% of the corporate shares. The instant action was commenced by filing on September 19, 2011. The complaint alleges that the Villano defendants withdrew funds from the corporation and diverted to their own personal use corporate funds and assets aggregating more than \$1,300,000 from 1998 through 2011. The complaint also alleges that the Villano defendants organized a separate limited liability company known as CRKJ, LLC in 1998. It is further alleged that the Villano defendants caused the transfer of approximately \$1,850,000 from the corporation to CRKJ, LLC, without the plaintiff's knowledge and consent. In their separate answers the defendants William Villano and Eileen Villano asserted cross-claims against each other and

counterclaims against the plaintiff for self-dealing and diversion of corporate funds.

In this motion to reargue, the plaintiff claims that the court overlooked the second branch of his motion, made on June 17, 2013, to disqualify Mr. Dunewood Truglia, Esq. as counsel for both the defendants William Villano and Eileen Villano. The Court agrees and grants the plaintiff's motion to reargue.

Upon reargument, the basis for the plaintiff's application is that the representation by Mr. Truglia will involve the lawyer in representing differing interests pursuant to Rule of Professional Conduct paragraph 1.7, which provides, in pertinent part, that a lawyer shall not represent a client if a reasonable lawyer would conclude that: (1) the representation will involve the lawyer in representing differing interests. The plaintiff claims that while the defendants asserted cross-claims against each other, Mr. Truglia should have declined to represent Eileen Villano in this litigation. Having failed to do so, he should now be disqualified from representing either of them. Plaintiff further claims that dual representation is fraught with the potential for irreconcilable conflict.

In opposition, the defendants submit, among other things, their counsel's affirmation, their personal affidavits, and a copy of Eileen Villano's consent to change attorney. The record reveals that the defendant Eileen Villano consented to change her attorney from Mr. Peter Mott, Esq. to Mr. Dunewood Truglia, Esq. on April 17, 2013, which consent was filed with the County Clerk on June 17, 2013. In addition, counsel affirms that the defendants William Villano and Eileen Villano settled their marital differences, and obtained a judgment of divorce on or about June 3, 2013. Also on June

3, 2013, the defendants William Villano and Eileen Villano stipulated to waive the cross-claims asserted against each other, which was filed with the County Clerk on June 17, 2013. Counsel states that the defendants consented to joint representation. The defendants each submit their personal affidavits in which they separately state that they settled their divorce action and also withdrew their cross claims against each other in this action. Each defendant further states that there is no conflict of interest between them.

The Rules of Professional Conduct, which were promulgated as joint rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and which supersede the former Part 1200 (Disciplinary Rules of the Code of Professional Responsibility), specifically, Rule 1.7 (a) provides that, "Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a]). concurrent representation may still occur, if "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve 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; and (4) each affected client gives informed consent, confirmed in writing." (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [b]).

While the disqualification of attorneys has been granted in cases where the clients have cross-claims against each other, *Hill v Berkshire Farm Center and Services for Youth*, 137 Misc. 2d 429, 521 NYS2d 358 (S. Ct. Onondaga Cty 1987), or where the clients will have discordant interests

at trial, *O'Reilly v. Executone of Albany, Inc.*, 135 AD2d 999, 522 NYS2d 724 (3rd Dept 1987), disqualification shall not be granted where the movant fails to make a clear showing that disqualification is warranted. *Olmoz v Town of Fishkill*, 258 AD2d 447, 684 NYS2d 611 (2nd Dept 1999). The decision to disqualify an attorney rests within the discretion the court. *Midwood Chayim Aruchim Dialysis Assoc., Inc. v Brooklyn Dialysis, LLC*, 82 AD3d 1177, 1178, 919 NYS2d 397 (2d Dept 2011); *Mondello v Mondello*, 118 AD2d 549, 550, 499 NYS2d 9 (2d Dept 1986), quoting *Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 277, 476 NYS2d 151 (2d Dept 1984); *Wells Fargo Bank, N.A. v Caro*, 82 AD3d 880, 881, 920 NYS2d 90 (2d Dept 2011).

The person seeking disqualification bears the burden of establishing grounds for disqualification. *Id.* The requisite burden is that the clients jointly represented have divided, adverse and conflicting interest. *Robbins v Ellman*, 65 AD2d 519, 409 NYS2d 140 (1st Dept 1978). Mere conclusory allegations, falling short of factual assertions, do not give rise to disqualification. *Olmoz v Town of Fishkill, supra*; *Lewis v Palestine*, 50 AD2d 752, 376 NYS2d 160 (1975); *Giblin v Sechzer*, 97 AD2d 833, 468 NYS2d 719 (2nd Dept 1983).

Here, the defendants have provided sworn statements that they have withdrawn their cross-claims against each other and that they are united in interest. Thus, the plaintiff has failed to meet his burden of showing that the defendants have divided, adverse and conflicting interests which would warrant disqualification. *Olmoz v. Town of Fishkill, supra*. Now that the conflict has been removed by waiving the cross-claims, the court finds that the plaintiff's claims constitute conclusory allegations which do not give rise to disqualification. *Id.*

The court finds, in its discretion, that under the present circumstances the plaintiff has failed to meet his burden of demonstrating that the defendants have divided interests. According, the branch of the motion seeking to disqualify Mr. Truglia from representing both William Villano and Eileen Villano is denied.

Dated: 4/16/14
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

Final
 Non Final