

Baron Realty Partners, LLC v O.C.P., Inc.

2014 NY Slip Op 32434(U)

September 10, 2014

Sup Ct, Suffolk County

Docket Number: 13-8640

Judge: Daniel Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 1-8-14 (#001 & #002)

MOTION DATE 2-11-14 (#003)

ADJ. DATE 2-11-14

Mot. Seq. #001 - MotD

#002 - MD

#003 - MotD

-----X
BARON REALTY PARTNERS, LLC,

Plaintiff,

- against -

O.C.P., INC. d/b/a MORANIA OIL OF LONG
ISLAND and the HYMAN RAFFE TRUST,

Defendants.

LEONARD J. SHORE, ESQ.
Attorney for Plaintiff and Third-party Defendants
366 Veterans Memorial Highway
Commack, New York 11725

MELTZER, LIPPE, GOLDSTEIN &
BREITSTONE, LLP
Attorney for Defendants/Third-party Plaintiffs
190 Willis Avenue
Mineola, New York 11501

-----X
O.C.P., INC. d/b/a MORANIA OIL OF LONG
ISLAND, CARL STIX, As Trustee of the Trust
Created Under Article Seventh of the LAST
WILL & TESTAMENT OF HYMAN RAFFE &
A.R. FUELS, INC.

Counterclaim/Third-Party Plaintiffs,

- against -

BARON REALTY PARTNERS, LLC,

Counterclaim Defendant
and

RONALD SHIELDS, BARBARA SHIELDS,
JASON SHIELDS and JASDAN REAL
ESTATE SERVICES, INC.,

Third-Party Defendants.
-----X

Baron Realty v OCP Inc.
Index No. 13-8640
Page No. 2

Upon the following papers numbered 1 to 43 read on this motion for summary judgment and motions to disqualify; Notice of Motion/ Order to Show Cause and supporting papers 1-12; 13-20; 21-27; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 28-37; Replying Affidavits and supporting papers 38-43; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order granting partial summary judgment in its favor is granted solely to the extent that the second and third counterclaims of the defendants are dismissed, and it is further

ORDERED that the motion by the third-party defendants for an order disqualifying the attorneys for the third-party plaintiffs is denied, and it is further

ORDERED that the motion by the defendants/third-party plaintiffs for an order disqualifying the attorney for the plaintiffs is denied, and it is further

ORDERED that the branch of the motion by the defendants/third-party plaintiffs for an order compelling discovery is granted solely to the extent that this action is referred to a preliminary conference.

In 2004, the defendant OCP Inc. d/b/a Morania Oil of Long Island (hereinafter OCP) leased certain commercial property located in the Village of Freeport from the plaintiff for a period of five years. The plaintiff corporation is owned by the third-party defendant Ronald Shields, who was employed as the president of OCP and the third-party plaintiff AR Fuels Inc., until he was terminated in 2010. OCP and AR Fuels are owned by the defendant the Hyman Raffe Trust. In 2009, the parties executed another five year lease for the premises. Section 4.01 of the lease provides that the premises may be used for any lawful purpose including OCP's business as a purchaser, seller and dealer of petroleum. The section further provides that the plaintiff represents that OCP may park its oil delivery trucks and repair/service trucks in the building or parking lot. In February 2013, OCP vacated the premises and stopped paying rent.

The plaintiff then commenced this action for breach of the lease. The first two causes of action seek damages for unpaid rent for the remainder of the lease term. The third cause of action seeks damages incurred in removing personal property left behind and repairs to the parking lot while the fourth cause of action seeks attorneys fees. The defendants asserted a counterclaim alleging that the plaintiff breached the lease by not allowing OCP to park its trucks in the building or parking lot. The second and third counterclaims allege that the plaintiff's owner was unjustly enriched as a result of services and property received while he was president of OCP and that he engaged in fraudulent acts against OCP. The defendants subsequently commenced a third-party action against Shields individually alleging that Shields usurped corporate opportunities and misappropriated assets while employed by OCP and AR Fuels. The third-party complaint alleges that Shields breached the duty of loyalty and his fiduciary duty to his employer by, inter alia, engaging in an interested party transaction since he was acting as both the landlord and president of OCP while negotiating the lease. The third-party complaint also alleges that Shields coerced AR Fuels to pay him the sum of \$1,000,000 in connection with the sale

Baron Realty v OCP Inc.
Index No. 13-8640
Page No. 3

of certain real property owned by AR Fuels and that Shields failed to pay for fuel oil, heating equipment and other items that he received while employed by OCP.

The plaintiff now moves for partial summary judgment on the first, second, third and fourth causes of action for breach of the lease and for dismissal of the second and third counterclaims. The third-party defendants move for an order disqualifying Thomas McGowan and the law firm of Meltzer, Lippe, Goldstein & Breitstone LLP (Meltzer Lippe) from representing the third-party plaintiffs. The defendants move for an order compelling discovery from the plaintiff and an order disqualifying the plaintiff's attorney, Leonard Shore.

In support of the motion for partial summary judgment, the plaintiff submits an affidavit from Shields and a copy of the lease. Shields asserts that OCP vacated the premises without justification. Shields also claims that the provision in the 2009 lease regarding the parking of vehicles should have been omitted from the lease because the Village of Freeport had previously advised the parties that trucks could not be legally parked on the premises. Shields claims that OCP was aware of this and the parties reached an agreement that a subtenant would remain on the premises and pay rent directly to OCP to offset the cost of storing the vehicles elsewhere. The plaintiff submits no evidence to support these claims other than the affidavit of Shields. In opposition, the third-party plaintiff Carl Stix, the trustee of the Hyman Raffe Trust, submits an affidavit disputing the plaintiff's assertions. Stix claims that the parking provision was intentionally kept in the lease and there was no agreement that the subtenant would be used to offset the storage costs. Stix asserts that the parking provision was a material term of the lease and that the plaintiff breached this provision. The plaintiff contends that OCP waived this provision because it never took steps to enforce the parking requirement.

A waiver is the voluntary abandonment or relinquishment of a known right and is a matter of intent which must be proved (*see Jefpaul Garage Corp v Presbyterian Hosp.*, 61 NY2d 442 [1984]). Here, Article 13 of the lease contains a no waiver clause. Although the existence of such a clause does not, by itself, preclude waiver of a contractual right, the issue of whether a waiver has occurred is generally one of fact (*see Peak Development v Construction Exchange*, 100 AD3d 1394 [4th Dept 2012]; *Dice v Inwood Hills Condo.*, 237 AD2d 403 [2d Dept 1997]). No discovery has been conducted in this action and the only evidence of waiver submitted by the plaintiff is the affidavit of Shields, which has been disputed by the affidavit of the trustee. Under these circumstances, issues of fact exist as to whether OCP waived enforcement of the parking provision (*see Duane Reade v Block 247 LLC*, 20 AD3d 448 [2d Dept 2005]). In addition, questions of fact exist regarding the third cause of action as the parties have submitted conflicting affidavits. Shields contends that OCP failed to remove certain items from the property while OCP's president asserts that Shields instructed him to leave these items. Accordingly, the motion for partial summary judgment on the first, second, third and fourth causes of action is denied. However, the branch of the motion to dismiss the second and third counterclaims is granted. The allegations in those counterclaims are against Shields individually while he was president of OCP and do not contain any claims against the corporate plaintiff. The defendants commenced a third-party action against Shields which essentially includes the same allegations as the counterclaims and are more properly asserted as part of the third-party action.

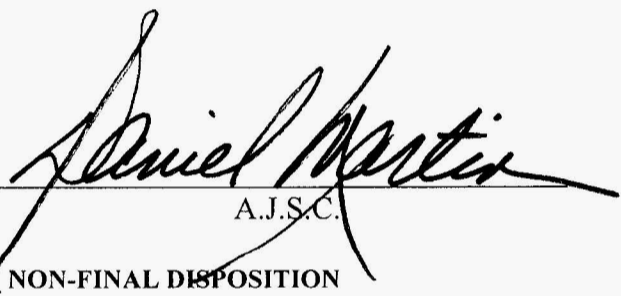
The parties each move to disqualify opposing counsel on the grounds of a conflict of interest. A party seeking disqualification of its adversary's lawyer must show the existence of a prior attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse (*see Falk v Chittenden*, 11 NY3d 73, 78 [2008]; *Jamaica Pub. Serv. Co v AIU Ins. Co.*, 92 NY2d 631 [1998]; *Tekni-Plex Inc v Meyner & Landis*, 89 NY2d 123 [1996]). Due to the "significant competing interests inherent in attorney disqualification cases," however, the Court of Appeals has advised against "mechanical application of blanket rules," in favor of a "careful appraisal of the interests involved" (*Tekni-Plex Inc v Meyner & Landis*, *supra* at 131-132; *see Gabel v Gabel*, 101 AD3d 676 [2d Dept 2012]). In that respect, "a party's entitlement to be represented in ongoing litigation by counsel of his or her 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. [Poritzky-DeName]*, 70 AD3d 941, 943 [2d Dept 2010] quoting *Aryeh v Aryeh*, 14 AD3d 634 [2d Dept 2005]; *see Gabel v Gabel*, *supra*).

Here, the third-party defendants contend that McGowan and Meltzer Lippe were counsel to Shields while he was the president of OCP and AR Fuels and the allegations in the third-party action arise out of that representation. However, 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 (*see Campbell v McKeon*, 75 AD3d 479 [1st Dept 2010]; *Kushner v Herman*, 215 AD2d 633 [2d Dept 1995]). In this case, the record indicates that Meltzer Lippe acted as counsel to the corporations. Shields has failed to submit any evidence establishing that McGowan or Meltzer Lippe had agreed to or acted as his personal attorney. Therefore, the third-party defendants have failed to demonstrate that an attorney-client relationship existed and that disqualification is warranted (*see Campbell v McKeon*, *supra*; *Abselet v Satra Realty*, 85 AD3d 1406 [3d Dept 2011]; *Kushner v Herman*, *supra*).

The defendants contend that Shore must be disqualified because he represented AR Fuels in its sale of certain parcels of real property and AR Fuels is now seeking to recover money paid to Shields as a result of those sales. While an attorney-client relationship existed between Shore and AR Fuels and the interests of AR Fuels and Shields are clearly adverse, the defendants must still show that the two matters are substantially related. In this case, there are no claims arising out of the sale of the properties. The only allegation in the third-party complaint concerns an agreement by AR Fuels to pay a fee to Shields in connection with the sales. Shields and Shore have both submitted affidavits asserting that Shore's representation was limited to the real estate transactions and that he had no involvement or knowledge of the agreement to pay Shields, which was an internal matter of AR Fuels. Shields avers that no payment was made to him at the closings and that funds were wired from AR Fuels' account after the closings were completed. The defendants have submitted no evidence disputing these assertions. Therefore, the defendants have failed to meet their burden of establishing that the matters involved in both representations are substantially related (*see Gabel v Gabel*, *supra*; *Medical Capital Corp v MRI Global Imaging*, 27 AD3d 427 [2d Dept 2006]; *Bloom v St Paul Travelers Companies*, 24 AD3d 584 [2d Dept 2005]).

The third-party defendants also contend that Meltzer Lippe should be disqualified because McGowan and another attorney at the firm will be called as witnesses in the case. To disqualify an attorney under the advocate-witness rule, the moving party must demonstrate that the testimony of the opposing party's counsel is necessary to the moving party's case and that such testimony would be prejudicial to the opposing party (*see S&S Hotel Ventures Ltd Partnership v 777 SH Corp.*, 69 NY2d 437 [1987]; *Cathedral Court Assoc v Cathedral Properties*, 116 AD3d 649 [2d Dept 2014]; *Magnus v Sklover*, 95 AD3d 837 [2d Dept 2012]). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence" (*S&S Hotel Ventures Ltd Partnership v 777 SH Corp.*, *supra* at 445-446; *see Wolfson v Posner*, 57 AD3d 979 [2d Dept 2008]; *Hudson Valley Mar. Inc v Town of Cortlandt*, 54 AD3d 999 [2d Dept 2008]). Here, the third-party defendants contend that McGowan will be called as a witness regarding benefits received from OCP and another attorney will be called regarding the sale of the properties by AR Fuels. However, no discovery has been conducted in this action and the third-party defendants have failed to demonstrate, at this juncture, that the testimony of counsel is strictly necessary (*see Dishi v Federal Ins. Co.*, 112 AD3d 484 [1st Dept 2013]; *Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). Accordingly, the motions to disqualify are denied.

Finally, the branch of the motion by the defendants to compel discovery is granted solely to the extent that this action is referred to a preliminary conference which shall be scheduled by the clerk (*see* 22 NYCRR 202.8[f]). The defendants are directed to serve a copy of this order on the Calendar Department.

Dated: September 10, 2014 
A.J.S.C.
 FINAL DISPOSITION X NON-FINAL DISPOSITION