Men Women N.Y. Model Mgt., Inc. v Kavoussi
2014 NY Slip Op 32515(U)
September 29, 2014
Supreme Court, New York County
Docket Number: 154076/14
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

MEN WOMEN N.Y. MODEL MANAGEMENT, INC.,

Plaintiff,

-against-

ALI KAVOUSSI,

Defendant.

INDEX NO. 154076/14
MOTION DATE 09-17-2014
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for disqualify plaintiff's attorneys and cross-motion for sanctions:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____cross motion ____	5 - 7
Replying Affidavits ____	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that defendant's motion seeking to disqualify plaintiff's attorneys, specifically, Brian S. Kaplan and the law firm of Kasowitz, Benson, Torres & Friedman, LLP, is denied. Plaintiff's cross-motion for sanctions pursuant to 22 NYCRR 130-1.1[c], is denied.

Defendant was employed by an agency called 1 Model Management, LLC (hereinafter referred to as "One Model") from 2004 through May 8, 2008, when he tendered his resignation letter and began working for the plaintiff. On June 11, 2008, One Model commenced an action in Supreme Court New York County, under index number 108191/2008, solely against the defendant for breach of his employment agreement, derived from the solicitation of models and the use of confidential and proprietary information. On June 12, 2008, defendant and plaintiff entered into a joint retainer agreement for legal representation by the law firm of Kasowitz, Benson, Torres & Friedman, LLP, signed by Brian S. Kaplan (hereinafter referred to collectively as "plaintiff's attorneys"), in the One Model litigation (Cross-Mot., Leccese Aff., Exh E). Defendant was represented by Kasowitz, Benson, Torres & Friedman, LLP, in the One Model litigation through November 16, 2011, when the parties entered into a stipulation of discontinuance (Cross-Mot., Kaplan A ff., Exh. I).

Defendant entered into an employment agreement with plaintiff as a "model manager" also known as a "booker," for a set term to expire on September 30, 2014. In November of 2013, defendant sought permission from plaintiff to terminate the employment agreement prior to the expiration date. Defendant also sought permission to continue to represent five specific models that were under contract with plaintiff. On November 25, 2013 plaintiff and defendant entered into a separation agreement terminating his employment, effective through December 6, 2014. The separation agreement included provisions for the non-disparagement of plaintiff and non-solicitation of plaintiff's managers and models, except for the five specific models named by

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

defendant. On April 28, 2014, plaintiff commenced this action for breach of the separation agreement alleging that the defendant violated its non-solicitation and non-disparagement provisions, and for injunctive relief (Cross-Mot., Kaplan Aff., Exh. A).

Defendant seeks an Order disqualifying plaintiff's attorneys, for conflict of interest derived from the services they rendered to him in the One Model litigation. Defendant contends that he had an ongoing relationship with plaintiff's attorneys in the One Model litigation which is substantially related to material issues in this action. Defendant also contends that he disclosed confidential information on his relationships with clients and business strategies to Mr. Kaplan, that would be used to his detriment in this action.

Plaintiff opposes the motion contending that there is no substantial relationship between the two actions. Plaintiff asserts that it was not named as a party to the litigation with One Model which took place over six years ago. Plaintiff also contends that two separate and distinctly different contracts are involved, this action involves a separation agreement, not an employment contract. Plaintiff argues that defendant has not specifically stated his claim of violation of confidential disclosure. It is also argued that as an employee of the plaintiff during the joint representation, defendant could not reasonably believe that his communications would be privileged as to plaintiff.

The disqualification of counsel rests within the sound discretion of the trial court (Ferrolito v. Vultaggio, 99 A.D.3d 19, 949 N.Y.S. 2d 356 [N.Y.A.D. 1st Dept., 2012]). A party seeking disqualification has the burden of proof on the motion (S&S Hotel Ventures, Ltd. Partnership v. 777 S.H. Corp., 69 N.Y. 2d 437, 508 N.E. 2d 647, 515 N.Y.S. 2d 735 [1987]). A determination of disqualification requires the balancing of general policy favoring a party's choice of representation by an attorney and potential related hardships, against any potential impropriety (Techni-Plex, Inc. v. Meyner and Landis, 89 N.Y. 2d 123, 6745 N.E. 2d 663, 651 N.Y.S. 2d 954 [1996]). A party seeking to disqualify his adversary's attorney, must establish, "(1) the existence of a prior attorney-client relationship between movant and opposing counsel; (2) that the matters involved in the prior and present representations are 'substantially related;' and (3) that the interests of the present client and former client are materially adverse." All three elements must be met (Reem Contracting Corp. v. Resnick Murray St. Associates, 43 A.D. 3d 369, 843 N.Y.S. 2d 3 [N.Y.A.D. 1st Dept., 2007] and Campbell v. McKeon, 75 A.D. d 479, 905 N.Y.S. 2d 589 [N.Y.A.D. 1st Dept., 2010]). To establish a "substantial relationship," it must be demonstrated that the issues in the present litigation are,"'identical to' or 'essentially the same' as those in the prior case (Lightning Park, Inc. v. Wise, Lerman & Katz, P.C., 197 A.D. 2d 52, 609 A.D. 2d 904 [1st Dept., 1994]).

There was clearly a prior attorney client relationship between plaintiff's attorneys and the defendant, and the interests of the parties are currently adverse, but defendant has failed to establish that the actions are "substantially related." The One Model action involved a prior employment contract and although jointly represented, plaintiff was not a party to that action. The claims brought are in the context of different types of agreements.

If a party fails to establish a "substantial relationship" between the actions, disqualification can still occur based on a showing that specific confidential disclosure existed during the course of representation that may be used to its detriment in the present action (Lightning Park, Inc. v. Wise, Lerman & Katz, P.C., 197 A.D. 2d 52,

supra and Jamaica Public Service Co. Ltd. v. AIU Insurance Company, 92 N.Y. 2d 631, 707 N.E. 2d 414, 684 N.Y.S. 2d 459 [1998]). A party is entitled to be free from the apprehension that prior representation will prejudice its interests (Cardinale v. Golinello, 43 N.Y. 2d 288, 372 N.E. 2d 26, 401 N.Y.S. 2d 191[1977]). An employee does not have a reasonable expectation of confidentiality in dealings with, or joint representation by, a corporate employer's attorneys (Meyers v. Lipman, 284 A.D. 2d 207, 726 N.Y.S. 2d 547 [1st Dept., 2001]). An express written agreement to waive conflict of interest will be enforced against the party that signed it (St. Barnabus Hospital v. New York City Health and Hospitals Corporation, 7 A.D. 3d 83, 775 N.Y.S. 2d 9 [1st Dept., 2004].

Defendant has not stated a basis to disqualify plaintiff's attorneys because of confidential disclosure. He fails to specifically identify the confidential disclosure that would result in a conflict of interest. The June 12, 2008 retainer agreement for the One Model litigation has a waiver provision referring to conflict of interest. The June 12, 2008 retainer agreement specifically states,

> "..you hereby waive any right to seek to disqualify the Firm as counsel or to disadvantage the Firm's other client(s) based on an alleged conflict of interest, and you agree not to challenge that withdrawal or the Firm's continuing representation of Women Management.
>
> All communications regarding the Engagement between or among you shall be treated as privileged and confidential as against all third persons. During the period of joint representation, the attorney client privilege will not bar disclosure to you of what has been communicated to us by Women Management, or our disclosure to Women Management of what has been communicated to us by you...." (Cross-Mot., Leccese Aff., Exh E).

Defendant has waived his expectation of confidentiality derived from communications to plaintiff's attorneys in the One Model litigation, in an express written agreement. The confidentiality referred to in the agreement only applies to "third persons," not the plaintiff.

Defendant argues that Brian Kaplan should be personally disqualified in this action pursuant to Disciplinary Rule 3.7(a), because he may be called as a necessary and hostile witness in this action related to his representation of the defendant in the One Model litigation.

Disciplinary Rule 3.7(a) is referred to as the "advocate witness rule," it requires an attorney to be disqualified from representation in a case if there is a probability that he or she will be called to testify. The movant must meet a heavy burden establishing that disqualification is warranted (Dishi v. Federal Insurance Company, 112 A.D. 3d 484, 976 N.Y.S. 2d 379 [1st Dept., 2013]). Disqualification requires that the testimony sought be deemed necessary and withholding it prejudicial to the party for whom it is sought. The Court will take into consideration factors such as, ". ...significance of the matters, weight of the testimony and availability of other evidence" (Broadwhite Assoc. v. Truong, 237 A.D. 2d 162, 654 N.Y.S. 2d 144 [1st Dept., 1997]).

Defendant has not met his heavy burden establishing the necessity of Brian Kaplan's testimony in this action to warrant the application of Disciplinary Rule 3.7(a). Defendant has not established that he would be prejudiced in defense of this action without the testimony of Brian Kaplan. Defendant fails to provide support for his

contentions that Mr. Kaplan's testimony is necessary concerning advice given on the unenforceable provisions of restrictive covenants found in both the One Model employment contract and the separation agreement, and cannot be established through the use of other evidence.

Plaintiff's cross-motion seeks sanctions for frivolous conduct pursuant to 22 NYCRR 130-1.1, derived from false assertions in the underlying motion papers and conduct intended to delay this litigation.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. The imposition of sanctions requires a pattern of frivolous behavior (Emery v. Parker, 107 A.D. 3d 635, 968 N.Y.S. 2d 480 [N.Y.A.D. 1st Dept. 2013] and Maroulis v. 64th Street-Third Avenue Associates, 77 N.Y. 2d 831, 567 N.E. 2d 978, 566 N.Y.S. 2d 584 [1991]). To establish conduct involving the assertion of material factual statements that are false the record must be bereft of evidence that the statements might be true (Getty Properties Corp. v. Getty Petroleum Marketing, Inc., 115 A.D. 3d 616, 982 N.Y.S. 2d 749 [1st Dept., 2014]).

Plaintiff has not established a pattern of behavior that requires sanctions. It has not been established that defendant's actions were part of a pattern of frivolous behavior, that intentionally false statements were made, or that he intentionally used motion practice in this action as a delay tactic. The defendant's statements alleged by plaintiff to be knowingly false, rely in part on assertions made in the complaint that were subsequently modified in Mr. Leccese's affidavit in support of the cross-motion. The defendant's motion is not part of a pattern that delayed this litigation and was brought relatively early in the litigation. Although the relief sought in the motion to disqualify has not been established, plaintiff has not established that it was frivolous.

Accordingly, it is ORDERED that defendant's motion seeking to disqualify plaintiff's attorneys, specifically, Brian S. Kaplan and the law firm of Kasowitz, Benson, Torres & Friedman, LLP, is denied, and it is further,

ORDERED, that plaintiff's cross-motion for sanctions pursuant to 22 NYCRR 130-1.1[c], is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: September 29, 2014

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE