

Trentadue v Brickman
2014 NY Slip Op 33075(U)
November 24, 2014
Supreme Court, Putnam County
Docket Number: 678/14
Judge: Lewis J. Lubell
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Dispo

To commence the 30 day statutory
time period for appeals as of right
(CPLR 5513[a]), you are advised to
serve a copy of this order, with
notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X
DOMINIC TRENTADUE, individually and as
Shareholder of KOROVA MILK BAR OF
WHITE PLAINS, INC.,

Plaintiff,

-against -

NEIL BRICKMAN,

Defendant.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 678/14

Sequence No. 1 & 2
Motion Date 8/25/14

The following papers were considered in connection with **Motion Sequence #1** by defendant for an order pursuant to CPLR 3211(a)(1), (2) and (7), dismissing the complaint on the grounds that plaintiff does not have standing to sue, no cause of action is stated against the defendant and in favor of the plaintiff, and that documentary evidence demonstrates that the complaint must be dismissed; and **Motion Sequence #2** by plaintiff for an Order, pursuant to the Rules of Professional Conduct, 22 NYCRR 1200, et. seq. disqualifying Jeffrey I. Klein, Esq., as attorney for defendant Neal Brickman, and for a further Order, granting such other and further relief as to the Court may seem just and proper:

PAPERS

NUMBERED

NOTICE OF MOTION/AFFIDAVIT/EXHIBITS A-J, 1-3	1
MEMORANDUM OF LAW	2
NOTICE OF CROSS MOTION/AFFIRMATION/AFFIDAVIT	3
REPLY MEMORANDUM OF LAW	4
AFFIDAVIT	5
MEMORANDUM OF LAW	6
REPLY AFFIDAVIT	7

As conceded by way of Affirmation in Opposition and Support of Cross Motion, this action is brought solely in plaintiff's individual capacity. As such, that aspect of defendant's motion to

dismiss is deemed moot and, heretofore, the caption shall be amended accordingly.

Plaintiff, Dominic Trentadue, is one of three shareholders of Korova Milk Bar of White Plains, Inc. ("Korova, White Plains"), a New York corporation formed for the purpose of operating a bar at 213 East Post Road, White Plains, New York. The other two shareholders are non-parties Nicholas Scandiffio and Todd Shenk. The bar went out of business in 2011. Prior to the formation of Korova, White Plains, the three men were shareholders in New York Corporation, Korova Milk Bar, Inc. ("Korova, N.Y.") which, until 2006, operated a bar at 200 Avenue A, New York, New York. Both corporations were represented by Jeffrey Klein, Esq., defendant Neal Brickman's ("Brickman") attorney in this action.

Plaintiff brings this action for, among other things, monetary damages in the amount of \$22,786.23 against Brickman, an attorney, for alleged violation of his fiduciary duties to plaintiff. More specifically, plaintiff alleges that when, upon coming into possession of \$75,000 of settlement funds (the "Settlement Funds") as the attorney for Korova, White Plains, in connection with a Federal court action filed in the United States District Court for the Southern District of New York, Korova Milk Bar of White Plains, Inc. v. PRE Properties LLC and Albert Silverman (11 Civ 3327), Brickman disbursed same without having first consulted him and/or allegedly contrary to an earlier representation as to how the Settlement Funds would be distributed.

Brickman notes that, notwithstanding plaintiff's assertion, plaintiff executed and forwarded the signature page of the Federal Court stipulation (Exhibit "H" to Brickman Affidavit sworn to May 21, 2014) without condition or comment following an exchange of e-mails between Brickman and Carl Lodes, plaintiff's then attorney (see, Exhibits "D" through "F" of Brickman Affidavit sworn to May 21, 2014). Klein neither participated in nor represented any parties in the Federal action.

In response to Brickman's motion to dismiss, plaintiff moves to disqualify Mr. Klein from representing Brickman since "Mr. Klein has represented the two closely held corporations in which I have been a shareholder [Korova, White Plains and Korova, NY]" and during which time plaintiff is alleged to have met with Mr. Klein and Mr. Shenk on matters related to Korova, NY State Liquor Authority matters. Although acknowledging that it was Korova, NY which retained Klein, plaintiff indicates that he had met alone with Mr. Klein "to discuss certain confidential information with him" and that "[he] considered Mr. Klein to be [his] attorney, as well as the attorney for the corporation."

Plaintiff notes that Klein drafted a proposed shareholder agreement, which was eventually signed by all. He also performed other functions that one might expect of corporate counsel, such as negotiating and modifying a lease and assisting the corporation with State Liquor Authority applications and issues. While also acknowledging that Korova, White Plains, had retained Klein, as Korova, N.Y. had, plaintiff makes other generalized references to the exchange of "confidential information" with Klein and "that [he] considered him to be my attorney . . . "

Prior to the initiation of this action, plaintiff commenced an asserted shareholder derivative action against Korova, White Plains, under Putnam County Index No. 2194-2011. Plaintiff contends that he stopped speaking with Mr. Klein about the affairs of the corporation upon "learn[ing] that Mr. Klein had chosen to represent shareholders Todd Shenk and Alex Fatouros." Plaintiff was represented by Carl Lodes. It does not appear that an RJI was ever filed in that action, and plaintiff advises that it was held in abeyance pending resolution of the Federal action.

This action follows the settlement of the Federal action, the discontinuance of the state action under Index No. 2194-2011, Brickman's receipt and disbursement of \$75,000 of settlement funds to compromised counsel fees and the compromise and extinguishment of corporate loans. No monies were distributed to any shareholder in their capacity as a shareholder. The settlement of the Federal action was agreed to by all shareholders. The disbursement of the funds was pre-approved by all except plaintiff who takes the position that he, as an equal shareholder, was entitled to one-third of the net proceeds after accounting for counsel fees, or approximately \$22,000.00.

Plaintiff's motion to disqualify Mr. Klein from representing Brickman is denied and defendant's motion to dismiss is granted.

Admittedly, Mr. Klein represented Korova, N.Y and Korova, White Plains, in connection with their corporate formation, existence and otherwise. Plaintiff seeks to disqualify Mr. Klein from representing Brickman, the former attorney to Korova, White Plains, and Korova, N.Y., because an "attorney should not be permitted to represent a party where, if judgment is rendered against that party, one shareholder will be benefitted to the detriment of other shareholders." While such could not here be the case since the person against whom the judgment would enter is Brickman, and not a shareholder, plaintiff surmises that, if plaintiff "succeeds in this action, he will be entitled to recover his portion of the monies previously held in escrow by Defendant Brickman" and . . . "most assuredly [Brickman] will seek to recover

those monies against Todd Shenk and Alex Fatouros [the other shareholders]." Correspondingly, plaintiff argues, if Klein is successful in getting the complaint dismissed, he would have succeeded in harming one shareholder, to the benefit of the other shareholders.

Plaintiff also argues that Klein represented plaintiff "in his capacity as a shareholder of the closely held corporation [Korova, White Plains] . . . [and, therefore] should not be permitted to represent Defendant Brickman in connection with litigation involving [Korova, N.Y.]."

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 (see Aryeh v. Aryeh, 14 A.D.3d 634, 788 N.Y.S.2d 622; Dominguez v. Community Health Plan of Suffolk, 284 A.D.2d 294, 725 N.Y.S.2d 377; Olmoz v. Town of Fishkill, 258 A.D.2d 447, 684 N.Y.S.2d 611). While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized (see S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 508 N.E.2d 647). The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination (see Aryeh v. Aryeh, supra; Petrossian v. Grossman, 219 A.D.2d 587, 588, 631 N.Y.S.2d 187). Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court (see Olmoz v. Town of Fishkill, 258 A.D.2d 447, 684 N.Y.S.2d 611).

(Gulino v. Gulino, 35 A.D.3d 812, 826 N.Y.S.2d 903, 904 [App. Div. 2006])

The Court does not find that plaintiff sustained his burden of demonstrating that disqualification is warranted as a matter of law, or in the Court's discretion.

This case must properly be viewed as an action by a purported

client against his alleged attorney for damages flowing from an asserted breach of fiduciary duty. Plaintiff's suggestion that, if Brickman, the defendant/attorney, were to be found liable to plaintiff/client for breach of fiduciary duty, Brickman would commence an action against two other former shareholders is not only speculative but would appear meritless as well. The argument that a victory by the defendant/attorney in having the case dismissed somehow puts the other shareholders at some advantage to plaintiff is rejected. Either way, the Court does not find that such would justify disqualification under the circumstances herein presented.

Plaintiff's contention that there is or was an attorney-client relationship between himself and Brickman is ill supported and is contradicted by documentary evidence, especially as it relates to the issues in this case.

With that in mind, the Court notes that it is the alleged existence of an attorney/client relationship that forms the basis of this action.

In determining the existence of an attorney-client relationship, a court must look to the actions of the parties to ascertain the existence of such a relationship (see, McLenithan v McLenithan, 273 AD2d 757, 758). The unilateral belief of a plaintiff alone does not confer upon him or her the status of a client (see, McLenithan v McLenithan, supra, at 759 Rather, an attorney-client relationship is established where there is an explicit undertaking to perform a specific task . . . Sucese v Kirsch, 199 AD2d 718, 719).

(Wei Cheng Chang v. Pi, 288 A.D.2d 378, 380, 733 N.Y.S.2d 471 (App. Div. 2001)).

Even upon "afford[ing] the pleading a liberal construction, accept[ing] all facts as alleged in the pleading to be true, accord[ing] the plaintiff the benefit of every possible inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (Young v. Campbell, 87 AD3d 692, 693-94 [2d Dept 2011] [internal quotation marks and citations omitted]), the Court does not find that plaintiff has stated a cause of action

for breach of fiduciary duty. This is especially so upon consideration of the documentary evidence submitted by defendant in support of the CPLR 3211(a)(7) and/or (a)(1) aspects of the motion to dismiss. Among other things, the retainer agreement between Korova, White Plains, and Brickman, conclusively establishes that Brickman was representing Korova, White Plains, and not plaintiff in any transactions relevant to this litigation. Plaintiff's unsupported and vague references to the contrary are not persuasive.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (Rut v. Young Adult Inst., Inc., 74 AD3d 776, 777 [2010]). Since defendant has adequately refuted the existence of an attorney-client relationship between plaintiff and defendant, and there being no other viable advancement of same, the Court grants defendant's motion to dismiss.

Based upon the foregoing, it is hereby

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

ORDERED, that, defendant's motion to dismiss is granted.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
November 24 , 2014

S/

HON. LEWIS J. LUBELL, J.S.C.

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