Ike & Sam's Group, LLC v Brach
2014 NY Slip Op 33738(U)
November 5, 2014
Supreme Court, Kings County
Docket Number: 500718/2011
Judge: David I. Schmidt
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At an IAS Term, COM-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of November, 2014.

P R E S E N T:
HON. DAVID I. SCHMIDT,
Justice.

Index No. 500718/2011

IKE AND SAM'S GROUP, LLC,

Plaintiff,

--against--

ABRAHAM BRACH, SIMPLY NATURAL FOODS, LLC, HEALTH FOOD BRANDS, LLC, NORTHSIDE PACKAGING CORP., and 74 MALL DRIVE REALTY, LLC,

Defendants.

DECISION AND ORDER

Mot. Seq. No. 3

ABRAHAM BRACH, SIMPLY NATURAL FOODS, LLC, HEALTH FOOD BRANDS, LLC, NORTHSIDE PACKAGING CORP., and 74 MALL DRIVE REALTY, LLC,,

Third-Party Plaintiff,

--against—

SAMUEL VINOKUROV, JEFFREY PRICE, LEOPOLD LEIBOWITZ, and GARY TISCHENKEL,

Third-Party Defendants.

By notice of motion dated April 30, 2014, defendants/third-party plaintiffs, Abraham Brach, Simply Natural Foods, LLC, Healthy Food Brands, LLC, Northside Packaging Corp. and 74 Mall Drive Realty move for an order pursuant to 22 NYCRR 1200.00, Rules 1.17 and 1.13

disqualifying attorney Steven R. Goldberg, Esq, from acting as counsel for plaintiff, IKE & SAM'S GROUP LLC.

Background

On or about September 1, 2011, by summons with notice, plaintiff, Ike and Sam's Group, LLC (the "Company" or "plaintiff"), commenced the instant action against defendant Abraham Brach ("Brach"), a member of the plaintiff, and Simply Natural Foods, LLC, Healthy Food Brands, LLC, Northside Packaging Corp. and 74 Mall Drive Realty, LLC, entities alleged owed in whole or in part and/or controlled by Brach (collectively "defendants"). The Company is in the business of selling popcorn. The nature of the claims stated on the summons with notice included breach of contract, conversion, misrepresentation, breach of fiduciary duty, breach of covenant of good faith, embezzlement, breach of covenant of fair dealing, replevin, unjust enrichment, fraud, conspiracy to commit fraud, constructive trust, injunctive relief, various torts and accounting. On or about September 15, 2011 the defendants appeared and served a demand for a complaint. On or about October 21, 2011, plaintiff served and filed a complaint. Thereafter, on or about November 8, 2011, plaintiff served and filed an amended complaint interposing nineteen causes of action alleging, *inter alia*, that Brach, individually and through the other defendant entities, violated his duties to the Company through an assortment of actions that, as alleged in the complaint, were undertaken to promote his own self-interest instead of the Company's best interests. On or about December 15, 2011, defendants served and filed an answer to the amended complaint. On or about February 22, 2012, defendants served and filed a summons and amended answer with counterclaims. The amended answer with counterclaims impleaded the remaining members of the Company, Samuel Vinokurov, Leopold Leibowitz, Jeffrey Price, and Gary Tischenkel ("counterclaim defendants"), and averred counterclaims against the newly added

counterclaim defendants and the plaintiff sounding in breach of fiduciary duty, breach of contract, conversion, fraud, goods sold and delivered and unjust enrichment.

Simultaneously with the litigation proceedings outlined above, on or about November 3, 2011, the defendants commenced a special proceeding against the Company and the counterclaim defendants seeking to stay the instant matter and compelling all parties to proceed with arbitration that had allegedly been ongoing prior to the commencement of the instant proceeding. The special proceeding, pending under Kings County Supreme Court Index Number 24842/2011, was converted into a dissolution proceeding and, within the context of that action, the parties engaged in motion practice and disclosure proceedings. In addition to the above referenced matters, on or about June 22, 2012, Samuel Vinokurov commenced a plenary action against the Company seeking to recovery consulting fees.

The bulk of the litigation between all of the parties has proceeded under in the instant matter since mid-2013. The claims of all the parties center on the purported failure of the company and its members to honor the obligations that the parties agreed to when they signed the "Agreement of Membership" on or about August 2009. The Agreement of Membership summarizes the transactions and occurrences leading to the formation of the Company and outlines and details the responsibilities and obligations the parties to the litigation have with respect to the plaintiff and to each other.

Defendants' current motion seeks to disqualify Steven R. Goldberg, Esq from acting as attorney for the Company. Defendants' raise three arguments in support of the request to disqualify plaintiff's counsel. First, defendants argue that Vinokurov and the Company are concurrently represented by attorney Goldberg and that the written waiver of that alleged conflict, signed by Vinokurov, Leibowitz and Price during the March 16, 2011 meeting of the Company

members/managers is invalid because the waiver does not comply with the requirements of the rules of professional conduct, the August 2009 Agreement of Membership or the Limited Liability Corporation Law. As a second basis for disqualification, defendants' argue that attorney Goldberg must be disqualified because Vinokurov, Price and Leibowitz were never authorized to retain attorney Goldberg on behalf of the Company. Defendants contend that the retention of attorney Goldberg, the payment of his fees and the commencement of this litigation are invalid because the March 16, 2011 meeting of the members was not held in accordance with the Agreement of Membership and, alternatively, was also held in violation of NY LLC Law § 405. Defendants conclude that because attorney Goldberg's hiring was improper his representation of the Company must be deemed void, *ab initio*, and attorney Goldberg must be directed to return the $42, 500 retainer that he received from the Company. Finally, defendants' argue that attorney Goldberg must be disqualified because the instant action is nothing more than derivative claims by Vinokurov, Price and Leibowitz improperly pled as direct claims made by the Company against Brach.

In opposition, plaintiff argues that defendants' motion to disqualify must be denied because attorney Goldberg does not concurrently represent Vinokurov and the Company concerning the transactions and occurrences at issue in this case, that the decision of the managing members to retain Mr. Goldberg was properly approved at the March 16, 2011 meeting of the members, the decision to retain attorney Goldberg was ratified by Brach when he participated in a subsequent meeting of the members on March 24, 2011 and Brach's failure to seek disqualification for three years and his active participation in the various litigations operates as a waiver of any purported conflict.

In further support of the motion to disqualify, defendants argue, *inter alia*, that attorney Goldberg alleged represented the Company during a period of time when Vinokurov, Leibowitz and Price were taking actions to restructure the Company to Brach's detriment. Defendants' contend that the concurrent representation also precludes Vinokurov from voting to retain Mr., Goldberg. Defendants' reiterate the issues concerning the impropriety with respect to the March 16, 2011 meeting of the members. Further, Brach's submits an affidavit denying he actively participated in the March 24, 2011 meeting because it was a last second telephone conference that had a bad connection from which he was disconnected. Finally, defendants' argue that the health issues of prior counsel led to the delay of bringing the instant motion and the current counsel of record served and filed the instant motion at the earliest possible opportunity.

Discussion

Initially, the court notes that during oral argument it was determined that the alleged conflict at issue in the present motion is of the "successive" nature and not one that should be categorized as "concurrent" because any potential conflict arises from attorney Goldberg's prior presentation of Vinokurov with respect to the Company's formation documents and an unrelated litigation concerning promissory note. Further, there is no evidence of a "concurrent" conflict inasmuch as attorney Goldberg solely represents the Company and has never represented any of the individual parties in the current case or the companion litigation. To the extent that defendants argue that the minutes of the March 16, 2014 membership meeting state otherwise, the court is satisfied with the clarification offered by attorney Goldberg and Vinokurov with respect to the nature of their prior attorney/client relationship. Also, since a concurrent conflict does not exist between the Company and Vinokurov, the provisions of 22 NYCRR 1200.0 Rules 1.7 and 1.13 do not apply and any issues raised by defendant concerning the validity of the waiver found in the

minutes of the March 16, 2014 membership meeting need not be addressed. The court notes that the "waiver" language found in the minutes refers to a "belief" that a conflict may have existed and is not an admission an ongoing conflict.

With respect to the alleged successive conflict between the Company and Vinokurov, a party seeking to disqualify an attorney or a law firm for an opposing party on the ground of conflict of interest has the burden of demonstrating (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 client and former client are materially adverse. *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]; *Solow v Grace & Co.*, 83 NY2d 303, 308 [1994]; *Sessa v Parrotta*, 116 AD3d 1029, 1029 [2014]; *Gabel v Gabel*, 101 AD3d 676 [2012].

Additionally, with respect to the timing of defendants' motion to disqualify opposing counsel, the Appellate Division, Second Judicial Department, in the case of *Hele Asset, LLC v. S.E.E. Realty Associates*, 106 A.D.3d 692, 964 N.Y.S.2d 570 (2nd Dept. 2013), recently reversed a lower court and denied a motion to disqualify a party's attorney stating in part that:

> "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. 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. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination" (*Gulino v. Gulino,* 35 A.D.3d 812, 812, 826 N.Y.S.2d 903 [internal citations omitted]; see *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443–445, 515 N.Y.S.2d 735, 508 N.E.2d 647). "Whether to disqualify an attorney is a matter which lies within the sound discretion of the court" (*Matter of Madris v.*

> *Oliviera*, 97 A.D.3d 823, 825, 949 N.Y.S.2d 696; see *Matter of Marvin Q.*, 45 A.D.3d 852, 853, 846 N.Y.S.2d 356; *Olmoz v. Town of Fishkill*, 258 A.D.2d 447, 684 N.Y.S.2d 611). Where a party seeks to disqualify its adversary's counsel in the context of ongoing litigation, courts consider when the challenged interests became materially adverse to determine if the party could have moved at an earlier time (see *Matter of Astor Rhinebeck Assoc., LLC v. Town of Rhinebeck*, 85 A.D.3d 1160, 1161, 925 N.Y.S.2d 896). If a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation (see *Matter of Aaron W. v. Shannon W.*, 96 A.D.3d 960, 961, 946 N.Y.S.2d 648; *Lake v. Kaleida Health*, 60 A.D.3d 1469, 1470, 876 N.Y.S.2d 800). Further, where a motion to disqualify is made in the midst of litigation where the moving party knew of the alleged conflict of interest well before making the motion, it can be inferred that the motion was made merely to secure a tactical advantage (see *Matter of Voss v. 87–10 51st Ave. Owners Corp.*, 292 A.D.2d 622, 624, 740 N.Y.S.2d 371).

Here, defendants make no assertion that attorney Goldberg ever represented any of the moving defendants. Also, defendants have admittedly been aware of the purported successive conflict between Goldberg and Vinokurov since prior to the commencement of the the instant litigation. Defendants' prior counsel had ongoing communication with attorney Goldberg prior to the commencement of the instant action, and continued to actively litigate this lawsuit and the companion litigation for several years before his passing. Brach's conclusory statement that his prior counsel's medical condition prevented this motion from being filed sooner is unsupported by the record. Additionally, Goldberg's prior representation of Vinokurov with respect to the drafting of the Agreement of Membership is not substantially related to the issues in the current litigation nor is Goldberg's prior representation of Vinokurov materially adverse to the Company because the issues in the instant litigation do not concern the validity of the membership agreement.

Finally, defendants' arguments attacking the validity of the resolutions adopted by the managers at the purportedly improper meeting held on March 16, 2011, and the subsequent ratification of the same resolutions during the telephonic meeting on March 24, 2011, during which Brach was present, are red herrings. Pursuant to the plain language of the Agreement of Membership, Goldberg was properly retained, and the actions taken by him with respect to pursuit of the instant litigation were properly authorized by a vote of 3 out of 4 managers the Company. Brach admittedly participated in the March 24, 2011 meeting and his claims that he was unable to meaningfully participate because of a bad connection are of no consequence since his vote would not have altered the adoption of the resolutions.

Therefore, in the court's discretion defendants' motion seeking to disqualify attorney Goldberg as counsel for the plaintiffs is denied.

This constitutes the Decision and Order of the Court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT