

Mermelstein v Moezinia
2014 NY Slip Op 33839(U)
February 11, 2014
Supreme Court, Nassau County
Docket Number: 601493-13
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**EDWARD MERMELSTEIN, individually and in the right
and on behalf of DDH PROPERTY HOLDINGS, LLC,**

**TRIAL/IAS PART: 15
NASSAU COUNTY**

Plaintiff,

**Index No: 601493-13
Submission Date: 12/16/13
Motion Seq. No. 2**

- against -

HERTZL MOEZINIA,

Defendant.

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The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....X**
- Affidavit in Opposition and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**

This matter is before the Court for decision on the motion filed by Defendant Hertzl Moezinia ("Defendant") to disqualify the law firm of Rheem, Bell & Mermelstein, LLP ("RBM") and the law firm of Rheem & Bell, LLP ("RB") from representing Plaintiffs in this action, and to disqualify Edward Mermelstein Esq. ("Mermelstein") from representing the derivative Plaintiff, DDH Property Holdings, LLC. For the reasons set forth below, the Court grants the motion.

BACKGROUND

A. Relief Sought

Defendant moves for an Order 1) disqualifying RMB and RB from representing the

Plaintiffs herein; ¹ and 2) disqualifying Mermelstein from representing the derivative Plaintiff DDH Property Holdings, LLC (“Company”).

Plaintiff opposes the motion.

B. The Parties’ History

The parties’ history is outlined in detail in a prior decision (“Prior Decision”) of the Court dated January 6, 2014 and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, the Complaint alleges that Mermelstein and Defendant were members of the Company, with each holding a 50% share in the Company. The Company was formed to acquire property located in Roslyn Heights, New York, and subsequently purchased that property. Mermelstein and Moezinia subsequently agreed to sell the property but, prior to that sale, Mermelstein asked Defendant to provide certain information regarding the closing, which Defendant never provided. In addition, Mermelstein advised Moezinia that he would be unable to attend the closing as scheduled, and objected to the closing going forward prior to his review of the closing Numbers. The closing proceeded, without Mermelstein’s consent. Upon learning that the sale had been completed, Mermelstein asked Moezinia to provide him with copies of the closing documents and an accounting of the sale proceeds, which Defendant has failed to provide. The Complaint contains four (4) causes of action: 1) by Plaintiffs, ² individually and derivatively, against Moezinia for breach of his fiduciary duties, 2) by Plaintiffs, individually and derivatively, against Moezinia for conversion based on his allegedly improper refusal to identify the location of the funds received from the Sale of the Property, 3) by Plaintiffs, individually and derivatively, against Moezinia on the theory of unjust enrichment, and 4) by Plaintiffs, individually and derivatively, against Moezinia for an accounting of monies received from the Sale. Plaintiff seeks monetary damages, punitive damages and injunctive relief.

¹ Defendant’s notice of motion makes reference to “Plaintiffs” in the plural, although the caption of the Verified Complaint (Ex. A to Zelenitz Aff. in Supp.) refers to “Plaintiff” in the singular, presumably because Defendant is seeking to disqualify counsel from representing both the individual plaintiff and the entity on whose behalf the individual plaintiff is suing.

In the Prior Decision, the Court denied Plaintiff's prior motion ("Prior Motion") for injunctive relief in its entirety. The Court denied the Prior Motion based on its conclusions that 1) Plaintiff had not demonstrated a likelihood of success on the merits in light of the conflicting affidavits regarding whether Mermelstein has an interest in the Company, and the fact that the K-1 filings submitted were not dispositive of Mermelstein's ownership interest; 2) Plaintiff had not demonstrated that he would suffer irreparable injury without the requested injunctive relief, in light of the Court's conclusion that Plaintiff's injury, if any, is compensable by money damages; 3) the Court could not conclude that a balancing of the equities favored Plaintiff, in part because the documentary evidence was not conclusive of Plaintiff's ownership claim; and 4) Plaintiff had not met the high burden of demonstrating the appropriateness of an Order of attachment and/or mandatory injunctive relief.

In opposition to the Prior Motion, Moezinia affirmed that the attorneys representing Mermelstein in this action are the same attorneys that Moezinia retained to represent him in forming the Company, as reflected by the filing receipt provided in connection with the Prior Motion. That filing receipt listed counsel as "Rheem & Bell LLP." The law firm that currently represents Mermelstein is "Rheem Bell & Mermelstein, LLP."

In support of the disqualification motion now before the Court, Moezinia affirms that RB represented him when he formed the Company. Plaintiff Mermelstein is now partners with Rheem and Bell, the attorneys constituting RB, and is suing Moezinia based on Mermelstein's claim that he is a part-owner of the Company. Moezinia submits that RB, which assisted Moezinia in forming the Company, will be witnesses in this action. Moreover, Moezinia contends, even if Mermelstein can represent himself in this action, he should not be permitted to represent the Company.

In opposition, Mermelstein affirms that the Company retained RB for the limited purpose of forming the Company and drafting an operating agreement for the Company. An operating agreement was drafted (Ex. A to Mermelstein Aff. in Opp.) pursuant to which Mermelstein and Moezinia would be equal partners in the Company, but was not signed. On May 15, 2009, the necessary formation documents were filed and the Company was formed, at which time RB's representation ended.

Mermelstein affirms that on or about September 10, 2010, the Company purchased the Roslyn Heights property, at which time it was represented by Robert Malewski, Esq. of the firm of Malewski Malewski & Boccio LLP. Neither RB nor RBM represented Mermelstein, Moezinia or the Company in the purchase of the property. Mermelstein disputes Moezinia's contention (*see Zelenitz Aff. in Supp. at ¶ 18*) that RB and RBM were formed on the same date. Mermelstein affirms that, while he shared office space with RB at the time that the Company was formed, he operated a separate firm called Edward A. Mermelstein & Associates, P.C., and was in no way affiliated with, or a member of, RB. Mermelstein provides documentation (Exs. K and L to Mermelstein Aff. in Opp.) reflecting that RB was formed on December 28, 2005, RBM was formed on January 15, 2010, and Edward A. Mermelstein & Associates, P.C. was dissolved on July 27, 2012.

Mermelstein affirms that he was never a member of RB when it operated under that name. He was a client of that firm when the Company was formed and, therefore, did not represent Moezinia with respect to the creation of the Company. Moreover, Mermelstein submits, this action does not arise out of the formation of the Company but, rather relates to the dispute stemming from the sale of the Roslyn Heights property on September 5, 2012. Thus, there is no basis for disqualification of RB, RBM or Mermelstein.

C. The Parties' Positions

Defendant submits that RBM is the same firm as, or a successor in interest to, RB which represented Defendant in the formation of the Company. Moreover, Mermelstein is now a partner with the attorneys who comprised RB, and is seeking a determination that he is a one-half owner of the Company, which was previously represented by attorneys who are now his law partners. Defendant argues that the determination of whether Plaintiff is, in fact, an owner of the Company is "clearly substantially related to" the formation of the Company (*Zelenitz Aff. in Supp. at ¶ 23*), and that the interests of Mermelstein are materially adverse to those of Defendant.

Plaintiff opposes the motion, submitting that 1) Defendant has failed to establish that there is a substantial relationship between the issues in the instant action and the subject matter of the prior representation, in light of the fact that the instant action stems from the allegedly unauthorized sale of the Roslyn Heights property and Defendant's retention of the proceeds from

that sale, not from the formation of the Company; 2) neither RB nor RBM represented Defendant or the Company in the purchase or sale of the Roslyn Heights property; 3) Defendant cannot demonstrate that there is a reasonable probability of disclosure of confidential information by Plaintiff's counsel such that disqualification may be proper; and 4) Moezinia has waived any objection to Plaintiff's choice of counsel, given his "inexplicable delay" (P's Memo. of Law at p. 9) in bringing this motion.

RULING OF THE COURT

Although a party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right that should not be abridged, such right will not supersede a clear showing that disqualification is warranted. *Scopin v. Goolsby*, 88 A.D.3d 782, 784 (2d Dept. 2011), citing *Matter of Marvin Q.*, 45 A.D.3d 852, 853 (2d Dept. 2007), *app. disp.*, 10 N.Y.3d 927 (2008), quoting *Campolongo v. Campolongo*, 2 A.D.3d 476 (2d Dept. 2003). A party seeking disqualification of its adversary's lawyer must prove: 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. *Scopin v. Goolsby*, 88 A.D.3d at 784, quoting *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131 (1996), *reh. den.*, 89 N.Y.2d 917 (1996).

A party's entitlement to be represented in ongoing litigation by counsel of its choice is a valued right. *Friia v. Palumbo*, 89 A.D.3d 896 (2d Dept. 2011), quoting *Hudson Val. Mar., Inc. v. Town of Cortlandt*, 54 A.D.3d 999, 1000 (2d Dept. 2008). Nevertheless, pursuant to Rule 3.7 of Professional Conduct (22 NYCRR 1200.0), unless certain exceptions apply, a lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. *Friia v. Palumbo*, 89 A.D.3d at 896, quoting Rules of Professional Conduct (22 NYCRR 1200.0) Rule 3.7(a) and citing *Falk v. Gallo*, 73 A.D.3d 685, 686 (2d Dept. 2010).

The Court grants the motion. Plaintiff's opposition to Defendant's disqualification motion is founded primarily on his contention that the formation of the Company is unrelated to the disputed sale at issue. The Court fundamentally disagrees, as Mermelstein's claim that he had a right to proceeds from the sale of the Roslyn Heights property is based on his contention

that he is a one-half owner of the Company, which Defendant disputes. Moreover, as outlined in detail in the Prior Decision, there is conflicting evidence on the issue of Mermelstein's interest in the Company, and Defendant relies in part on the fact that the operating agreement to which Mermelstein refers was never signed. Thus, the formation of the Company and drafting of the operating agreement, which were handled by RB, are substantially related to the issues raised in the Complaint. The Court also concludes that the interests of Mermelstein and Defendant are materially adverse, as Mermelstein is suing to assert an ownership interest in the Company that his current law partners helped form, which interest Defendant denies. In addition, in light of the fact that the drafting of the operating agreement is likely to be addressed at the trial of this action, the attorneys who drafted that operating agreement are likely to be witnesses at the trial, thereby providing another basis for disqualification.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on February 25, 2014 at 9:30 a.m. At that conference, the Court anticipates Plaintiff Edward Mermelstein advising the Court whether he will continue to represent himself in this action, and further anticipates that substitute counsel will enter an appearance on behalf of Plaintiff DDH Property Holdings, LLC, and on behalf of Plaintiff Mermelstein, if he elects not to continue to represent himself.

ENTER

DATED: Mineola, NY

February 11, 2014



HON. TIMOTHY S. DRISCOLL

J.S.C.
ENTERED

FEB 21 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE