

Tricarico v Baer

2015 NY Slip Op 30511(U)

April 1, 2015

Supreme Court, Suffolk County

Docket Number: 31988-2013

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 31988-2013

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 12-09-2014; 11-25-2014
 Motion Submit Date: 03-26-2015
 Motion Sequence Nos.: 007 MD
 008 MOTD

_____ X
**DONNA TRICARICO, Individually and doing
 business as THE SPA 25,**

Plaintiff,

- against -

**FLORENCE BAER, individually and doing business
 as THE SPA 25, JON BAER, Individually and doing
 business as JDFOB, INC., RUTH ELLEN SCIARRINO
 and LAWRENCE SCIARRINO, JR., individually
 and doing business as SPA 25 OF SELDEN INC.,**

Defendants.

_____ X

Attorney for Plaintiff

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In this commercial action, counsel for Defendant JDFOB, Inc. (“JDFOB”) moves, by Notice of Motion, for an Order (1) disqualifying John Mulvehill Esq., (“Mulvehill”), counsel for Plaintiff Donna Tricarico (“Tricarico”), and (2) disqualifying Barry Driesman, Esq. (“Driesman”), counsel for Defendant Florence Baer. Florence Baer also moves, by Notice of Motion, for an order

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disqualifying Mulvehill from representing Tricarico. In each instance the attorney whose disqualification is sought, opposes the relevant motion(s).

The essence of the stated basis for seeking disqualification of Mulvehill lies in the purported relationship between this action and a separate negligence action before a civil part in Suffolk County Supreme Court. The instant action arises out of a purported partnership, known as Spa 25, between Tricarico and Florence Baer. Tricarico seeks dissolution of the partnership and monetary damages against Florence Baer for breach of the partnership agreement. Tricarico is also claiming that JDfB as well as another entity known as Spa 25 of Selden, Inc. and other individuals, including the owner of JDfB and Florence Baer's husband, Jon Baer, have tortiously interfered with the Tricarico-Florence Baer partnership agreement and converted the partnership's assets. In a separate action, entitled *Nalyia Blair v The SPA 25, Inc. aka Simply Cheryl, Cheryl Sonnanburg, Rejuv 25 Laser Inc and JDfB Inc.* ("Tort Action"), that Plaintiff alleges that all of the named Defendants engaged in the business of laser hair removal at a location of 750 Middle Country Road in Selden, New York and that their failure to properly perform laser procedures caused the Tort Action Plaintiff's injuries.

In support of its motion to disqualify Mulvehill, JDfB claims that Mulvehill represents both Spa 25, Inc. and Florence Baer in the Tort Action. JDfB claims that even though Florence Baer is not a named defendant in the Tort Action, as a shareholder of Spa 25, Inc. she is a "de jure"

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client of Mulvehill's in the Tort Action, whom his client, Tricarico, is suing in this action. JDFOB's counsel also avers that Barry Driesman represents JDFOB in the Tort Action and Florence Baer in this action and that they have conflicting interests in this action.

Mulvehill

The essence of JDFOB's argument is that because the Plaintiff in the Tort Action is seeking a remedy against the Spa 25, Inc., a now dissolved corporation without assets, such assets must be held in trust for the benefit of creditors by the corporate shareholders, who will be jointly and severally liable for any judgment incurred. It is his contention that the same pool of assets, in his view all being held by JDFOB, are the only ones available should a judgment be rendered against the Defendants in the Tort Action; that similar causes of action are asserted against the Defendants in both actions; and all the subject entities are located in the same place.

Mulvehill opposes the motion on several grounds. First, he states that Florence Baer is not a named party in the Tort Action. He avers further that although he did request an adjournment of time on behalf of Spa 25, Inc. to answer in the Tort Action, he has not otherwise represented the Spa 25, Inc. in the Tort Action. He sets forth that the entity sued in the Tort Action - the Spa 25, Inc - was dissolved the same day (8/12/13) it was created and prior to the commencement of the Tort Action; and that it never held any assets whatsoever, and never issued shares nor made any distributions to its shareholders, Florence Baer and Donna Tricarico. He claims that he has never met nor spoken with Florence Baer and obtained no confidences from her at any time. He asserts

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that such entity is not, in fact, even named in this action, which was brought on behalf of the partnership between Tricarico and Florence Baer, the assets of which Florence Baer, Jon Baer, JDFOB and others allegedly converted.

Driesman

Barry Driesman asserts that no conflict exists between JDFOB and Florence Baer because the Tort Action involves claims of personal injury caused by alleged negligence and this action involves solely a business dispute among various parties. In addition, he claims that the interests of Florence Baer in this action are aligned with and not adverse to those of JDFOB, owned by Florence Baer's husband, and that no claim has been asserted by JDFOB against Florence Baer in this action.

JDFOB Reply

In reply, JDFOB's attorney states that the only documentary proof concerning the existence of Spa 25, Inc. demonstrates that it was dissolved months after it was originally created (2/14) and not on the same day; and that its original incorporation did place a certain asset value on the entity. He also avers that Mulvehill does represent the Spa 25, Inc. in the Tort Action since, in addition to obtaining an extension of time to answer, he wrote to opposing counsel advising that he should amend his complaint to add JDFOB as a Defendant due to the lack of insurance for the corporate

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entity he represented. After such letter, the tort Plaintiff's attorney amended his complaint to add JDFB as a Defendant therein.

JDFB's counsel in this action states that the interests of JDFB and Florence Baer are adverse as it is JDFB's contention in this action that Florence Baer conspired with her friend Donna Tricarico to enter into a partnership agreement and utilized the assets of JDFB (a business she does not own) as consideration for the same. In addition, he asserts that the only reason JDFB is in the Tort Action is because Florence Baer participated in the dissolution of the Spa 25 Inc., which now has neither insurance nor assets.

Discussion

Where, as in the case at bar, the Rules of Professional Conduct are cited as a basis for disqualification of an attorney, the Court must utilize same as guidelines; however, it is not required to read them either literally nor to effectuate what it perceives as the intent of the original drafters. *Niesig v Team 1*, 76 NY 2d 363, 369-370 (1990); *S & S Hotel Ventures Ltd Partnership v 777 SH Corp*, 69 NY 2d 437 (1987). The Court is, therefore, required to consider the broad range of interests at stake and is afforded discretion in such determination. *Gordon v OBLAKOR*, 117 AD 3d 681 (2d Dep't 2014).

As relevant to consideration of the issues raised by counsel for JDFB, the Court sets forth

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the following Rules of Professional Conduct:

Rule 1.7 Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
 - (1) the representation will involve the lawyer in representing differing interests; or
 - (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.13, Organization As Client, – implies that a lawyer employed by an organization represents the organization. It also sets forth in paragraph (d) that a lawyer representing an organization may also represent any of its shareholders subject to the provisions of Rule 1.7.

While a motion for disqualification clearly implicates the ethics of the legal profession, it also clearly has a substantial effect on the rights of the parties. *S & S Hotel Ventures Ltd Partnership v 777 SH Corp, supra*. As recently stated by the Appellate Division, Second Department:

“A party's entitlement to be represented by counsel of his or her

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choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted,” *Homar v American Home Mortgage Association*, 119 AD 3d 901 (2d Dep’t 2014); *Gordon v OBLAKOR, supra*.

Thus, since the relief sought impacts upon a significantly valued right, the burden is on the party seeking the disqualification to demonstrate a good basis therefor. *See S & S Hotel Ventures, supra*. Moreover, a party’s conclusory assertions of a conflict of interest are insufficient to grant such a motion and in and of themselves do not necessarily require a hearing. *Olmoz v Town of Fishkill*, 258 AD 2d 447 (2d Dep’t 1999).

With regard to representation of a corporate entity, it is important to remember that no attorney-client relationship exists between that attorney and the corporate employees or shareholders unless such is specifically requested and agreed upon pursuant to Rule 1.13. *see, Cusack v Greenberg Traurig, LLP*, 109 AD 3d 747 (1st Dep’t 2013).

JDFB’s counsel recites repeatedly his assertion that the so-called three tier test set forth in common law demonstrates that there is a basis for disqualification for which there can be no defense. The test to which counsel refers, citing *Town of Oyster Bay v 55 Motor Avenue Co*, 109 AD 3d 549 (2013), actually applies in those cases where a conflict exists between former and current clients. A party seeking such relief in those cases can obtain disqualification upon establishing: (1) the existence of a prior attorney-client relationship; (2) that the former and current representations are both adverse and substantially related; and (3) that the interests of the present

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and former client are materially adverse, *see Solow v WR Grace & Co*, 83 NY 2d 303 (1994).

In the motions before the Court, the alleged concurrent representations by both Mulvehill and Driesman present some rather complex issues. In the case of Mulvehill, although he stated during oral argument that he never really represented any party in the Tort Action, his notice of appearance, request for an adjournment of the time to answer or move, and his suggestion to Plaintiff's counsel in that action that JDFB was the proper Defendant in that action, is enough in this Court's view to constitute representation of the Spa 25 Inc. in the Tort Action. However, the Court disagrees, based upon prevailing law, with JDFB's counsel in this case that Mulvehill ever represented Florence Baer in any action. He clearly represented the corporate entity and not its shareholders as described above; and that is not a case where a conflict exists between the corporate entity and the shareholders. In addition, Mulvehill has stated in his affirmation, and such was never contradicted during the oral argument before the Court nor in any opposition papers, that he has never spoken to nor met with Florence Baer. Thus, there is no evidence that he learned any of her confidences. In addition, the Court disagrees with JDFB's attorney that there is a substantial relationship between an action brought by a Plaintiff who claims she was physically injured at the spa and an action involving breach of a partnership agreement and tortious interference with that business relationship by another entity. JDFB's repeated argument that the shareholders of the dissolved entity may ultimately be liable for a judgment against the corporation in the Tort Action is not a basis for a finding that Mulvehill actually represents such shareholders. Under the facts

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and assertions as set forth in the moving and opposition papers, the Court finds, in exercise of its discretion, that JDFB has not sustained its burden of demonstrating that a clear conflict exists between Mulvehill's representation of a corporate entity in one action and his representation in this action involving a partnership against a person who was a shareholder of the dissolved corporate entity. This is supported further by the uncontradicted assertion that no confidences were ever exchanged between Mulvehill and Florence Baer.

With regard to Driesman, there is no question that he represents JDFB in the Tort Action and Florence Baer in this action. While Driesman argues that his client is allied with JDFB in this action, JDFB's counsel does not agree. JDFB's attorney in this action has made a motion to dismiss the complaint as asserted against JDFB, which, if granted, would leave Florence Baer in a more difficult position without JDFB which, if found liable for tortious interference with the contract that Florence Baer allegedly breached, would be liable for whatever damages were caused by Florence Baer's breach. While the Court agrees with Driesman that there does not exist a substantial relationship between the two actions, the conflict between Florence Baer, Driesman's client in this action and JDFB, Driesman's client in the Tort Action, is significant. To the extent that Driesman wishes to protect JDFB in the Tort Action, he may not be inclined to oppose JDFB's motion to dismiss on behalf of Florence Baer in this action. On the other hand, if he opposes JDFB's motion to dismiss this action on behalf of Florence Baer, such a position would be adverse

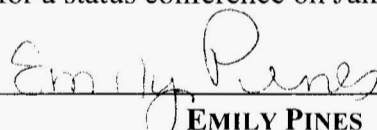
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to JDFOB, his client in the Tort Action. As stated “[a] conflict of interest exists, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s representation of another client in a different action,” 22 NYCRR 1200.0 1.7 NYSBA Comment Conflicts in Litigation. In the Court’s view, such a conflict warrants disqualification. While Driesman has obtained the consent of Florence Baer to continued representation of both, he has not obtained the consent of JDFOB.

Based upon the above, this Court finds that there exists insufficient grounds to disqualify Mulvehill from representation of Tricarico in this action and the Spa 25 Inc. in the Tort Action. On the other hand, the Court finds that JDFOB has sustained its burden of demonstrating sufficient grounds for disqualification of Driesman from representing Florence Baer in this action.

Accordingly, JDFOB’s and Florence Baer’s motions to disqualify Mulvehill are denied; and JDFOB’s motion to disqualify Driesman is granted. This constitutes the **DECISION** and **ORDER** of the Court. This matter is stayed for a period of 45 days to afford Florence Baer time to retain new counsel in this action. This matter is scheduled for a status conference on June 1, 2015.

DATED: 5/1/15
RIVERHEAD, NEW YORK


EMILY PINES
J. S. C.