

<b>Benjamin v Yeroushalmi</b>
2015 NY Slip Op 32930(U)
February 3, 2015
Supreme Court, Nassau County
Docket Number: 003563-14
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 14  
NASSAU COUNTY

**JIM BENJAMIN and BEHROUZ  
BENYAMINPOUR,**

**Plaintiffs,**

**-against-**

**MOTION SEQUENCE: 01  
INDEX NO.:003563-14**

**MOUSSA YEROUSHALMI and FARZANEH  
YEROUSHALMI,**

**Defendants.**

**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion	1
Affirmation in Opposition	2
Affirmation in Opposition	3
Reply Affirmation	4
Exhibit submitted after hearing: Retainer Agr.	5

Plaintiffs move for an order, pursuant to Rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.0), disqualifying counsel for Defendants based upon an alleged conflict of interest.

**Factual Background**

*The New York Action*

In October 2007, 23 East 39<sup>th</sup> Street Management Corporation ("Management Corp.")

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sold the building it owned located at 23 East 39<sup>th</sup> Street in Manhattan to 23 East 39<sup>th</sup> Street Developers LLC ("Developer LLC"). Jim Benjamin is the authorized representative of Developer LLC, which has two equal shareholders, namely Farzaneh Yeroushalmi and Behrouz Benyaminpour (a/k/a, and referred to herein as, "Bruce Benjamin"). Pursuant to a lease, Management Corp. remained a tenant at the property. On December 29, 2008, Management Corp. commenced an action in the Supreme Court of New York County entitled *23 East 39<sup>th</sup> Street Management Corporation v 23 East 39<sup>th</sup> Street Developer LLC, Bruce Benjamin, Moussa Yeroushalmi and Farzaneh Yeroushalmi* (Index No. 117303/08) (the "New York action"). In the New York action, Management Corp., as tenant under a lease with Developer LLC, sought the return of its security deposit after vacating the leased premises. Developer LLC counterclaimed against Management Corp. for unpaid rent. By order dated June 21, 2011, the Supreme Court (Ling-Cohan, J.) granted summary judgment dismissing the New York action as against the individual defendants and referred the matter to a Special Referee to determine the amount owed to Developer LLC on its counterclaim against Management Corp.

The New York action was later stayed by Developer LLC's bankruptcy filing, but subsequently restored to the calendar. At that time, in February 2013, the firm of Robinson Brog Leinwand Greene Genovese & Gluck P.C. (the "Firm") was substituted as legal counsel for Developer LLC.<sup>1</sup> By order dated April 3, 2014, the Special Referee found Developer LLC entitled to an award in the sum of \$349,999.98.<sup>2</sup> Bruce Benjamin appeared as a witness on behalf of Developer LLC at the hearing before the Special Referee and testified that he was the managing member of Developer LLC (Rich Affirmation in Opposition at ¶ 17).

### *The Instant Action*

On April 10, 2014, Plaintiffs Jim Benjamin and Bruce Benjamin commenced the instant action against Moussa Yeroushalmi and Farzaneh Yeroushalmi (the "Yeroushalmi Defendants") asserting causes of action for: breach of contract; contribution; fraud in fact and in the inducement; conversion; unjust enrichment; and quantum meruit. These six causes of action

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<sup>1</sup> On January 23, 2013, Bruce Benjamin retained the Firm to represent Developer LLC in a lawsuit against Management Corp. (Ex. "C" to Motion) and Exhibit submitted after hearing (annexed hereto) (discussed infra).

<sup>2</sup> Developer LLC moved to reargue the referee's decision, but that motion remains undecided. Developer LLC also filed a notice of appeal from that same decision, but the appeal has not yet been decided.

allegedly arise from three separate transactions: 1) the acquisition of real property located at 242 and 250 Old Country Road, Mineola, New York by a joint venture entered into between Plaintiffs and Defendants; 2) the purchase of property located at 800 South Wilbur Avenue, Syracuse, New York by Syracuse Resort Development Incorporated, a corporation formed by Plaintiffs and Defendants; and 3) an investment by Plaintiffs in a business proposal made by Defendants regarding Hip Pop Beverages, LLC. (Ex. "A" to Motion). Importantly, Defendants have retained the Firm to represent them in the instant litigation.

Plaintiffs now seek the disqualification of the Firm in the instant action on the ground that the Firm's concurrent representation of the Defendants in the instant action conflicts with their representation (allegedly of the Plaintiffs herein) in the New York action.

In an interlocutory order dated December 3, 2014, the court directed a hearing to be held to explore issues raised, but not fully addressed, in the motion papers. The hearing was held on January 15, 2015.

In consideration of the motion papers, the exhibits thereto and the hearing conducted on January 15, 2015, the motion is denied.

#### **The Court's Determination**

The Plaintiffs' motion for disqualification of the Firm is based upon Rule 1.7 of the Rules of Professional Conduct, which provides:

##### **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;

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(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 (Rules of Professional Conduct Rule 1.7 [22 NYCRR § 1200]).

The disqualification of an attorney is in the sound discretion of the court (*Nationwide Assoc., Inc. v Targee Street Internal Medicine Group, O.C.*, 303 AD2d 728 [2d Dept 2003]). Consideration is given to competing concerns, namely, avoiding the appearance of impropriety against the right of a party to choose his own attorney, and to the possibility that the motion may be used for some strategic advantage (*S&S Hotel Ventures Ltd Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]). In *Greene v Greene* (47 NY2d 447, 451-52 [1979]), the Court of Appeals stated:

It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law . . . . For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests. This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.

When the Rules of Professional Conduct are invoked in litigation, courts are not constrained to read the rules literally or to effectuate the intent of the drafters, but should utilize the rules as guidelines applied with due regard for the broad range of interests at stake (*Gordon v Ifeanyichukwu Chuba Orakwue Obiakor*, 117 AD3d 681, 682 [2d Dept 2014]). A party's right to be represented by counsel of its choosing should not be abridged absent a clear showing that disqualification is warranted (*Homar v American Home Mortgage Acceptance, Inc.*, 119 AD3d 901 [2d Dept 2014]; *Trimarco v Data Treasury Corp.*, 91 AD3d 756 [2d Dept 2012]; *Aryeh v Aryeh*, 14 AD3d 634 [2d Dept 2005]).

Where counsel accepts employment against a former client, the party seeking disqualification must establish both the existence of a prior attorney-client relationship and that the former and current representations are both adverse and substantially related (*Solow v Grace*

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& Co., 83 NY2d 303, 308 [1994]). However, when representation of clients with adverse interests is simultaneous, such adverse representation is prima facie improper (*Matter of T'Challa D. (Shavonne R.)*, 3 AD3d 569 [2d Dept 2004]; *Thaler v Jacoby & Meyers Law Offices*, 294 AD2d 230 [1<sup>st</sup> Dept 2002]; *Aerojet Props. v State of New York*, 138 AD2d 39 [3d Dept 1988]). An attorney may not represent a party in one matter and be adverse to that party in another concurrent matter unless the attorney opposing disqualification demonstrates "the absence of any actual or apparent conflict in loyalties or diminution in the vigor of . . . representation" (*Thaler v Jacoby & Meyers Law Offices*, 294 AD2d at 231, *supra*).

It is undisputed that the Firm - counsel for the Yeroushalmi Defendants in the instant action - was previously retained by Plaintiff Bruce Benjamin to represent Developer LLC, a limited liability company, whose members include Plaintiff Bruce Benjamin and Defendant Farzaneh Yeroushalmi, in the New York action that is currently pending. Although the retainer agreement was signed by Bruce Benjamin "individually and on behalf of: 23 East 39<sup>th</sup> Street Developers LLC And its Members individually", the scope of representation appears to have been limited to Developer LLC, as noted in the opening paragraph of the retention letter and as confirmed at the hearing conducted on January 15, 2015. Accordingly, the conflict, if any, is based on the simultaneous representation of Developer LLC in the New York action and the Defendants herein.

Initially, the court notes that the applicable ethics rule in relation to representation of an organization is Rule 1.13. Under that rule, representation of an organization is distinct from representation of the organization's constituents, members, directors and officers. It is true that this "entity" approach to attorney/client conflict may yield under particular circumstances to what might be characterized as a "flow through" approach, nevertheless, those circumstances have not been demonstrated here (see *Kushner v Herman*, 215 AD2d 633 [2d Dept 1995]; *The New York Rules of Professional Conduct: Spring 2011*, ed. New York County Lawyers' Assn. Ethics Institute, at pp.308-09). In any event, the Firm has demonstrated the complete absence of any conflict in loyalties or other impediment to a vigorous representation of each client.

In this regard, the court notes that Bruce Benjamin and the Yeroushalami Defendants were dismissed from the New York action approximately 19 months prior to the Firm's retention by Developer LLC in the New York action. In addition, while not determinative in resolving whether there is a potential for conflict in the Firm's continued representation of Defendants in this matter, it is significant that the New York action and the instant action are entirely distinct and involve wholly unrelated business entities, properties, facts and issues (*Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144 [1st Dept 2006]; *Asset Alliance Corp. v Ervine*, 279 AD2d 365 [1st Dept 2001]). Moreover, since the Firm's compensation in the

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New York action is based upon a percentage of any recovery obtained in the New York action, there is little likelihood that the Firm counsel would not exercise their best efforts in that matter on behalf of Developer LLC (Ex. "C" to Motion). Finally, the Firm specifically attests that it has received only limited information regarding Developer LLC during their representation in the New York action and did not learn any other information regarding Developer LLC's individual members or any other business ventures in which the parties were involved (Rich Affirmation in Opposition at ¶ 16).<sup>3</sup>

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<sup>3</sup> The Plaintiffs argue that the "cases are substantially related in that they both involve the collection of money. Benjamin is seeking to collect lost profits from its business ventures with the defendants in the [instant] action while simultaneously seeking to collect money from the defendant in the [New York action]. [The Firm] currently represents Benjamin in its efforts to collect money *for* Benjamin while simultaneously representing a client in its effort to collect money *from* Benjamin. As a result, [the Firm] has knowledge and potential access to assets belonging to Benjamin in the [New York action] that can and will be prejudicial to them in the within action" (Reply Affirmation in Support at ¶¶ 8-9 [emphasis in original]).

In his affirmation in opposition, Jonathan W. Rich states:

In February 2013, Robinson Brog was substituted in as counsel to Developer in place of its former attorney, James O. Guy, Esq. \* \* \*

During that time, I, along with other attorneys at Robinson Brog, met with Bruce [Benjamin] and Moussa [Yeroushalmi] at our office twice - once in January 2013 to discuss Action No. 2 [New York action], and then again in about August 2013 to discuss the status of the hearing on damages. We also spoke with Developer LLC's members on the phone and exchanged emails. In preparing for the conclusion of the damages hearing, I reviewed only Developer LLC's records, which consisted of invoices bills, checks, some photographs of the Premises and the subject lease. Robinson Brog was not presented with nor learned about any other information regarding Developer LLC or its individual members or any other business ventures in which the parties were involved.

\* \* \*

In April 2014, the Special Referee issued his decision and order on Developer LLC's damages. Because I concluded that the Special Referee erred in reaching his conclusion, Robinson Brog filed a notice of appeal and motion to reargue his decision, both of which are still pending.

Besides litigating the narrow issue of damages owed to Developer LLC [in the New York action], Robinson Brog has had no involvement in any other part of the liability phase of Action No. 2. Robinson Brog had no part in defending the defendants in that action, and, as previously stated, that branch of the litigation has been disposed.

In moving to disqualify the Firm, Plaintiffs have failed to identify any confidential information which may have been revealed during the course of the New York action (*Bluebird Partners, L.P. v Bank of N.Y.*, 21 Misc3d 1140[A] [Sup Ct New York County 2008]).

Conclusion

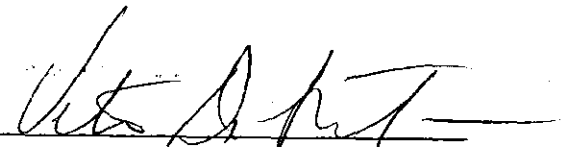
Defendants have established to the court's satisfaction that there is no conflict, nor any impediment to counsel's vigorous representation of the parties in both the New York action and the instant action. Balancing the right to counsel of choice against any possible appearance of impropriety, under the particular circumstances herein, there is no basis for disqualification of the Firm (see *Matter of T'Challa D. (Shavonne R.)*, 3 AD3d 569 [2d Dept 2004]; *Siroty v Nelson*, 200 AD2d 617 [2d Dept 1994]; cf. *Steven's Distribs, Inc. v Gold, Rosenblatt & Goldstein*, 2010 NY Slip Op 31839[U], 2010 WL 2984352, 2010 NY Misc LEXIS 3336 [Sup Ct New York County 2010]).

Accordingly, it is hereby

Ordered that the Plaintiffs' motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: February 3, 2015

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

FEB 09 2015

NASSAU COUNTY  
COUNTY CLERK'S OFFICE