

Dantes v Megalopoli, LLC
2018 NY Slip Op 32548(U)
September 11, 2018
Supreme Court, Kings County
Docket Number: 509990/15
Judge: Larry D. Martin
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At an IAS Term, Part 41 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 11th day of September, 2018.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice

-----X

AUSTIN DANTES, REGIS EDWARD AND HENRY LLOYD,

Plaintiffs,

- against -

Index No. 509990/15

MEGALOPOLI, LLC, GEORGE VASILAKIS, VASILEIOS PAGANOS AND VOLMAR CONSTRUCTION, INC.,

Defendants.

-----X

The following papers numbered 1 to 9 read herein:

	<u>Papers Numbered</u>	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1, 2</u>	<u>3, 4, 5</u>
Opposing Affidavits (Affirmations) _____	<u>6</u>	<u>7</u>
Reply Affidavits (Affirmations) _____	<u>8</u>	<u>9</u>

Upon the foregoing papers, plaintiffs move, by two separate motions (motion sequences 6 and 7), for various relief relating to discovery and for an order disqualifying Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP and Frank Brennan, Esq. (Forchelli) from representing defendants Megalopoli, LLC and George Vasilakis. The court's June 14, 2018 short form decision and order regarding motion sequence 6 denied all discovery requested and reserved decision on plaintiffs' request to disqualify Forchelli from representing defendants Megalopoli, LLC and George Vasilakis. Motion sequence 7, not addressed in the June 14, 2018 decision and order, is decided herein.

Plaintiffs seek in this action to recover damages from defendants for allegedly receiving less than the prevailing wages and supplemental/fringe benefits to which they were entitled as carpenters working under government contracts from March 2013 to September 2014.¹

Motion Sequence 6

Plaintiff contends that Forchelli's representation of both George Vasilakis and Megalopoli, LLC, is a conflict of interest, and that the dual representation violates Rule 1.7 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0), which reads as follows:

“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;

¹In paragraph 2 of plaintiffs' first and second amended complaint, the time periods alleged for failure to properly pay plaintiffs are “. . . from on or about March, 2013 through September 2014 and from on or about June, 2014 through August 2014.” Since the two time periods overlap, the court has listed the longer time period for simplicity's sake (*see* plaintiffs' first amended complaint, annexed as exhibit 3 to its motion sequence 6 papers; *see also* plaintiffs' second amended complaint, not included in the submissions herein, but electronically filed and appearing as NYCEF Doc. No. 55 in the Kings County Clerk's e-file system for this action).

- (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.”

To bolster their contention that a conflict of interest exists, plaintiffs highlight those portions of George Vasilakis’ deposition testimony which demonstrate that Mr. Vasilakis:

1. did not retain Forchelli to represent Megalopoli, LLC (*see* Vasilakis tr at 8)²;
2. did not know that Forchelli was also representing Megalopoli, LLC (*id.*);
3. did not pay Forchelli to prepare pleadings for Megalopoli, LLC (*id.*);
4. did not pay Forchelli, to represent Megalopoli, LLC (*id.*);
5. was never an owner of Megalopoli, LLC, but was given a salary and commission from Megalopoli, LLC (*see* Vasilakis tr at 13-15) and signed checks on behalf of Megalopoli, LLC (*see* Vasilakis tr at 17); and
6. was unhappy with Megalopoli, LLC, because it owed him money, commissions, etc., and he just wanted to leave (*see* Vasilakis tr at 90).

Plaintiffs contend that the dual representation of George Vasilakis and Megalopoli, LLC creates a conflict of interest because George Vasilakis was unaware that Forchelli was representing Megalopoli, LLC and because George Vasilakis’ expressed dissatisfaction with

² George Vasilakis’ deposition transcript is annexed as exhibit 22 to plaintiff’s motion sequence 6 papers.

Megalopoli, LLC may be used by Forchelli should it represent Megalopoli, LLC or George Vasilakis in some future litigation to address George Vasilakis' dissatisfaction with Megalopoli, LLC.

Discussion

It is well settled New York law that an application for disqualification of an adversary's counsel is not to be automatically granted and requires the exercise of discretion especially when raised in the context of litigation (*see S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). The court must carefully balance the right of litigants to choose their own counsel, and "[c]onsidering all the significant interests to be balanced, it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation" (*id.* at 444).

In the instant matter, plaintiffs have failed to demonstrate that the court should disqualify Forchelli from representing both George Vasilakis and Megalopoli, LLC. Plaintiffs have failed to establish a conflict of interest on the record and have only shown contradictions with Mr. Vasilakis' deposition testimony.³

³More specifically, Mr. Vasilakis testified at his deposition that he had no ownership interest in Megalopoli, LLC (see Vasilakis Tr at 8-15), but he executed and filed tax documents for 2013 and 2014 on behalf of Megalopoli, LLC which stated that he owned a 49% interest in Megalopoli, LLC (see exhibit 4 annexed to the April 7, 2018 reply affirmation of plaintiffs' counsel re motion sequence 6). In addition, Mr. Vasilakis states in a June 18, 2018 affidavit that he is a member of Megalopoli, LLC and that he retained Forchelli to represent him and Megalopoli, LLC. Indeed, Mr. Vasilakis verified the "Defendants' Response to Plaintiffs' First Set of Interrogatories" which clearly reads in the very first paragraph of the document that the response is submitted for both "Defendants Megalopoli, LCC and George Vasilakis" and repeats at the very end of the document that Forchelli is the attorney for both Megalopoli and George Vasilakis (see exhibit 23, annexed to plaintiffs' sequence 6 motion papers herein at 1 and 17 et seq.).

Plaintiffs argue that Mr. Vasilakis' dissatisfaction with Megalopoli, LLC creates a conflict of interest between him and Megalopoli, LLC because the information Forchelli learned herein *may* create a conflict in some future litigation between Mr. Vasilakis and Megalopoli, LLC. If Forchelli has learned certain confidences as attorney herein from Mr. Vasilakis and then uses them in future litigation between Mr. Vasilakis and Megalopoli, LLC such behavior would violate Rules 1.8 (b)⁴ of the Rules of Professional Conduct (22 NYCRR 1200.00). However, it is far from certain that there will be litigation between Mr. Vasilakis and Megalopoli, LLC in the future over purported unpaid wages and commissions, etc. There is no pending litigation nor plans for said litigation in this record, and Mr. Vasilakis has testified (*see* Vasilaki tr at 84) that he is still on good terms with Vasileios Paganos, who along with his wife, Nathalie Paganos are listed in defendants' response to plaintiffs' first set of interrogatories, as the other shareholders of Megalopoli, LLC.⁵ Such a potential conflict is far too remote to interfere with a litigant's choice of attorney (*see Reichenbaum v Reichenbaum & Silberstein*, 162 AD2d 599, 601 [2d Dept 1990], *appeal dismissed* 77 NY2d 873 [1991]). Moreover, if there is any litigation between Mr. Vasilakis and Megalopoli, LLC such "conflict" can then be addressed.

⁴"A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

⁵ George Vasilakis lists Nathalie Paganos as a 51% owner of Megalopoli, LLC on the 2013 and 2014 tax filing, and when asked, in Interrogatory 12, to list all shareholders of Megalopoli, LLC from 2012 through 2014 other than himself, he identified Vasileios Paganos, and his wife Nathalie Paganos as shareholders of Megalopoli, LLC (*see* exhibit 23, annexed to plaintiffs' sequence 6 motion papers at 12).

Plaintiffs's also seem to argue that payment by Megalopoli, LLC to Forchelli creates a conflict of interest by violating Rule 1.8 (f) of the Rules of Professional Conduct (22 NYCRR 1200.0), which reads as follows:

Rule 1.8: Current clients: specific conflict of interest rules

(f) "A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6."

There is nothing, however, in the record to indicate Forchelli ever accepted any funds from Megalopoli, LLC, or that if it did that said funds were used to pay for Mr. Vasilakis' representation. Additionally, Mr. Vasilakis states in his June 18, 2018 affidavit that he retained Forchelli to represent himself and Megalopoli, LLC, and therefore, on these facts, there is no basis for the court to conclude that payment by Megalopoli, LLC of legal fees known to Forchelli constitutes a violation Rule 1.8 (f) of the Rules of Professional Conduct.

Motion Sequence 7

Plaintiffs move under CPLR 3126⁶ for an order striking Mr. Vasilakis' answer for his

⁶ The notice of motion additionally, but inappropriately, references CPLR 3042, which involves bills of particulars and are not a subject of this motion.

failure to provide authorizations for IRS tax forms DTF-505 and 4506 for 2013 and 2014 as well as complete copies of his tax returns for 2013 and 2014 including schedules C, E, and K-1.

Mr. Vasilakis has responded to the demand for tax authorizations and copies of his complete tax returns for 2013 and 2014. The response lists general objections A through N, specifically objects to both demands and reserves the right to produce his schedules C, E and K when they become available. The response also objects to supplying the authorizations for his complete tax filings for 2013 and 2014 stating in part that the returns are joint with his spouse, and he has no authority to have her execute the authorization.

Plaintiffs argue that copies of the tax returns are necessary because they are uncertain who were actually their employers, corporate or otherwise, despite having maintained that their “bosses” were George Vasilakis and Vasileios Paganos. Plaintiffs seem to argue that they had a de facto employer but their de jure employer may have been another person or entity. Defendant Volmar Construction Inc. has been deposed, and it appears that the plaintiffs might have actually been working for Tectonic Services Inc. (Tectonic). Mr. Vasilakis has testified he worked for Tectonic from 2013 and 2014 and that Tectonic did the work at Fort Dix, one of the three government contracts under which plaintiffs sue.

Plaintiffs claim that the request for the tax schedules is to determine if Mr. Vasilakis, or another individual or entity was an owner of Tectonic Construction Inc. Mr. Vasilakis, in response to the discovery demand for his tax schedules, stated that he did not have copies of

tax schedules C, E, and K for 2013 and 2014 but reserved the right to supplement his answers when said became available. Moreover, Mr. Vasilakis has attached his tax schedule E from 2014 to his June 18, 2018 affidavit.

The identity of the employers in this case is obviously material and necessary. Therefore, Mr. Vasilakis, by counsel, is to provide, within 20 days of service of this decision and order with notice of entry, (1) copies of his filed Schedules C, E and K for 2013 and 2014 with all individuals' social security numbers redacted and (2) an authorization enabling Mr. Vasilakis' personal accountant to release to plaintiffs' counsel Mr. Vasilakis' filed Schedules C, E and K for 2013 and 2014 with all individuals social security numbers redacted. The remainder of the relief requested is denied as overbroad and unwarranted at this time, especially considering that the entire tax filings of Mr. Vasilakis, whether individual or joint, contain much information which is immaterial and unnecessary to this action. That portion of plaintiffs' motion for attorneys' fee is likewise denied. Accordingly, it is

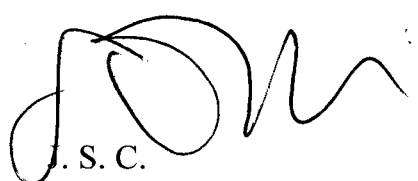
ORDERED that the branch of plaintiffs' motion (motion sequence 6) to disqualify Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana and Frank Brennan, Esq. from representing Megalopoli, LLC and George Vasilakis herein is denied; and it is further

ORDERED that plaintiffs' motion (motion sequence 7) to strike the answer of George Vasilakis and for other relief is granted to the extent that counsel for Mr. Vasilakis shall serve a copy of Mr. Vasilakis' 2013 and 2014 tax schedules C, E, and K-1, with social security numbers redacted, upon plaintiffs' counsel within 20 days after service of this decision and order with notice of entry; and it is further

ORDERED that counsel for Mr. Vasilakis shall serve a duly executed and notarized authorization by Mr. Vasilakis for Mr. Vasilakis' personal accountant to release copies of Mr. Vasilakis' tax schedules C, E, and K-1, with social security numbers redacted, to plaintiffs' counsel within 20 days after service of this decision and order with notice of entry.

The foregoing constitutes the decision and order of the court.

ENTER, SEP 11 2018



J. S. C.
HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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ms #7 - GEXT

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