

Mann v Sasson

2018 NY Slip Op 33904(U)

July 23, 2018

Supreme Court, Rockland County

Docket Number: 031259/2017

Judge: Robert M. Berliner

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
HOWARD MANN, as Personal Representatives of the
ESTATE OF PHILIP MANN, Individually, and
Derivatively on Behalf of ASSOCIATES OF ROCKLAND
COUNTY, LLC, and Derivatively on behalf of
ASSOCIATES OF ROCKLAND COUNTY, INC.,

Plaintiff,

DECISION & ORDER
Index No. 031259/2017

-against-

URI SASSON, ARNOLD GARELICK, ASSOCIATES
OF ROCKLAND COUNTY, LLC, a New York limited
liability company, nominally, ASSOCIATES OF
ROCKLAND COUNTY, INC., a New York corporation,
nominally, RICKI H. BERGER, and RICKI H. BERGER,
P.C.,

Defendant(s).

-----X
Hon. Robert M. Berliner, J.S.C.

The following papers numbered 1- 9 were considered in connection with Defendant Ricki H. Berger and Ricki H. Berger, P.C.'s Notice of Motion (Motion #1) for an Order dismissing the verified complaint as asserted against the Berger Defendant pursuant to (i) Civil Practice Law and Rules § 3211(a)(7) for failure to state a valid cause of action as a matter of law, (ii) Civil Practice Law and Rules § 3211(a)(4) as there is another action with the same parties and claims pending in federal court and (iii) together with such other and further relief as this Court deems just and proper; and also considered in connection with Plaintiff's Notice of Motion (Motion #2) for an Order disqualifying Mark Anesh and the law firm Lewis Brisbois Bisgaard & Smith, LLP as counsel for Ricki H. Berger, P.C. in the above-captioned action & ordering them to pay attorney's fees and costs of Plaintiff Howard Mann, as Personal Representative of the Estate of Philip Mann to litigate this motion and any other and further relief the Court deems just and proper; and also considered in

connection with Defendants Arnold Garelick, Associates of Rockland County, LLC and Associates of Rockland County, Inc. Notice of Motion (Motion #3) for an Order dismissing or staying the causes of action asserted against them upon the ground that there is another prior action pending between the Plaintiff and the Garelick Parties for the same or substantially similar causes of action namely the case of Sasson et al. v. Mann as Personal Representative of the Estate of Philip Mann, Case No. 7:15-cv-06601-CS (USDC SDNY), and/or based on the statute of limitations and failure to state a cause of action and for each other and further relief as may be just and proper; and is also considered in connection with Defendant Uri Sasson's Notice of Motion for an Order pursuant to Civil Practice Law and Rules §§ 3211(a)(4), (a)(7) and 2201, to dismiss or alternatively stay - Counts I through V of the Complaint and filed by Plaintiff Howard Mann ("Plaintiff") and for such other and further relief as this Court may deem just and proper; and also considered in connection with Plaintiff's Notice of Motion (Motion #5) for an Order pursuant to Civil Practice Law and Rules § 3217(b) for an Order permitting voluntary discontinuance of claims without prejudice against Defendant Uri Sasson and Defendant Arnold Garelick and for such other and further relief as this Court may deem just and proper:

PAPERS**NUMBER**

Notice of Motion (Motion #1)/Affidavit of Jamie R. Wozman, Esq./Exhibits (A-C)/ Memorandum of Law on Behalf of Attorney Defendants Ricki H. Berger and Ricki H. Berger, P.C. in Support of their Pre-Answer Motion to Dismiss Plaintiff's Verified Complaint	1
Memorandum of Law in Opposition (Motion #1)	2
Memorandum of Law in Reply (Motion #1)	3
Notice of Motion (Motion #2)/Affidavit of Howard Mann/Exhibits (1-3)/ Memorandum of Law in Support	4
Notice of Motion (Motion #4)/Memorandum of Law in Support/Affirmation of Clay J. Pierce, Esq./Exhibits (A-D)	5
Notice of Motion (Motion #3)/Affirmation of Reginald H. Rutishauser, Esq./ Exhibits (A-C)/Memorandum of Law in Support	6

Affidavit of Mark. K. Anesh, Esq./Exhibits (A-I)/Memorandum of Law in Opposition (Motion #2)	7
Notice of Motion (Motion #5)/Affirmation of Ilene Jaroslaw, Esq./Memorandum of Law/Affirmation of Richard M. Haggerty, Esq.	8
Memorandum of Law in Reply (Motion #2)	9

The instant action involves a family dispute regarding two (2) businesses, Associates of Rockland County, LLC and Associates of Rockland County, Inc. that decedent Philip Mann allegedly co-owned with Defendants Uri Sasson (hereinafter "Sasson") and Arnold Garelick (hereinafter "Garelick"), who are also decedent Mann's son-in laws. Additionally, Plaintiff, the son of decedent Philip Mann and the Personal Representative of Philip Mann's Estate commenced the instant action against Defendants Ricki H. Berger and Ricki H. Berger, P.C. regarding their representation of the aforementioned business regarding a mortgage obtained by Defendant Associates of Rockland County, LLC in 2014 and the 2014 preparation and filing of Associates of Rockland County Inc.'s Certificate of Amendment of Incorporation.

Plaintiff commenced the instant action on March 20, 2017 in his capacity as Personal Representative of his deceased father's Estate and derivatively on behalf of Associates of Rockland County, LLC and Associates of Rockland County, Inc. asserting nine (9) causes of action. The parties were served with the Summons and Complaint pursuant to *Civil Practice Law and Rules* § 308. Subsequently, Defendants filed a Notice to Remove the instant action to federal court on April 20, 2017. On May 3, 2017 the Rockland County Clerk's Office e-filed a letter dated April 27, 2017 from counsel to Defendant Sasson to Hon. Cathy Siebel of U.S. District Court for Southern District of New York. The letter is so ordered by the Hon. Cathy Siebel and indicates that "[a]fter conferring with Plaintiff's counsel Defendants have determined that removal in this case was improper." As a result, the instant letter sought withdrawal of the April 20, 2017 Notice of Removal and to litigate "this matter in state court." At the time Defendant Sasson filed the instant Notice of Removal there was a related case pending before the Honorable Cathy Seibel, 7:15-CV-06601.

Defendants Ricki H. Berger and Ricki H. Berger, P.C. (hereinafter "Berger Defendants") filed a pre-answer Motion to Dismiss (Motion #1) pursuant to *Civil Practice Law and Rules* § 3211(a)(7) for failure to state a valid cause of action as a matter of law and § 3211(a)(4) arguing that

there is another action (in federal court) with the same parties and claims pending in federal court. Plaintiff filed a motion to disqualify the Berger Defendants counsel, Mark K. Anesh, Esq. (Motion #2). Defendants Garelick, Associates of Rockland County, LLC and Associates of Rockland County, Inc. filed a pre-answer Motion to Dismiss (Motion #3) pursuant to Civil Practice Law and Rules §§ 3211(a)(4),(5) and (7). Defendant Sasson filed a pre-answer Motion to Dismiss (Motion #4) pursuant to Civil Practice Law and Rules §§ 3211(a)(4),(5), (7) and in the alternative for a dismissal or stay pursuant to Civil Practice Law and Rules § 2201 regarding Counts I through V of the instant complaint. Plaintiff filed a motion pursuant to Civil Practice Law and Rules § 3217 seeking a voluntary discontinuance without prejudice against Defendant Sasson and Defendant Garelick.

MOTION #5

The Court has before it Plaintiff's unopposed motion to discontinue the action pursuant to Civil Practice Law and Rules § 3217(b) as to Defendants Sasson and Garelick. Civil Practice Law and Rules § 3217(b) provides the court with authority to discontinue an action. Such application should be granted unless there are reasons which would justify its denial. [Wells Fargo Bank, N.A. v. Fisch, 103 AD3d 622 (2013); Tucker v. Tucker, 55 NY2d 378 (1982)]. The determination of those reasons "rests within the sound discretion of the court," and the motion should be granted "[i]n the absence of special circumstances, such as prejudice to a substantial right of the Defendant, or other improper consequences." [Expedite Video Conferencing Servs., Inc. v. Botello, 67 Ad3d 961 (2009)]. Further, it should be granted unless the discontinuance would circumvent an order of the court, avoid the consequences of a potential adverse determination or produce other improper results." [Jamaica Hosp. Med. Ctr. Inc. v. Oxford Health Plans [NY], Inc., 58 AD3d 686 (2d Dept 2009); Kaplan v. Village of Ossining, 35 AD3d 816 (2d Dept 2006)].

In support of the unopposed application Plaintiffs assert that there are no cross claims between the Defendants and therefore the Defendants' rights will not be prejudiced by the Court granting a voluntary discontinuance of the instant action against Defendants Sasson and Garelick. Further, Plaintiff asserts "[t]he claims and counterclaims between and among Plaintiff and

Defendants in this action will be fully litigated in the Federal Action.” In the Court’s discretion, the Plaintiff’s unopposed motion is granted.

MOTION #4

Defendant Uri Sasson filed the instant Motion to Dismiss pursuant to Civil Practice Law and Rules § 3211(a)(4), (5) and (7) or for a stay pursuant to Civil Practice Law and Rules § 2201 for a stay of the instant action. Subsequent to the filing of the instant motion, the Plaintiff filed Motion #5 seeking to voluntarily dismiss the instant action against Defendants Garelick and Sasson. As stated above, the motion to dismiss voluntarily is granted as unopposed by the Court and as such the instant motion is denied as moot.

MOTION #3

Defendants Garelick, Associates Rockland County, LLC and Associates of Rockland County, Inc. filed the instant pre-answer motion to dismiss pursuant to Civil Practice Law and Rules § 3211(a)(4) based upon the fact that another action is pending between the parties in Federal Court. Further, Defendants argue that the Federal Rules of Civil Procedure provide for compulsory counterclaims, which means that any counterclaims arising from the same subject matter can and must be asserted in Federal Court and cannot be asserted in a separate action. Accordingly, Defendants argue that the Defendants can still assert any claims raised in the instant action in Federal Court and that the commencement of the instant action subsequent to the Defendants commencement of their federal action is an attempt to forum shop and seek a different result than what they may obtain in federal court.

The Plaintiffs have voluntarily discontinued the instant action as to the Defendants Sasson and Garelick conceding that the claims and counterclaims between the Plaintiff and Defendants in the state action can be fully litigated in the federal action. Therefore, the instant motion to dismiss is moot as to Defendants Sasson and Garelick.

The Complaint in the instant action has raised four (4) causes of action: (1) the first cause of action alleges a breach of fiduciary duty against Defendant “Rockland LLC” as a “derivative”

action; (2) the second cause of action alleges a “derivative” action in accounting against Defendant “Rockland LLC”; (3) the third cause of action alleges a breach of fiduciary duty against Defendant “Rockland, Inc.” as a “Derivative” action; and (4) the fourth cause of action alleges a “derivative” action in accounting against Defendant “Rockland, Inc.”

According to Defendants, Philip Mann (hereinafter “the Decedent”) executed a buy-out agreement on September 30, 1997 with Defendants Sasson and Garelick, his son-in-laws. Defendants submit that the three (3) men had several family companies doing real estate in Rockland County and the Decedent sought to retire and sought to avoid a large negative tax consequence or any forgiveness of debt income by withdrawing from the businesses. Further, Defendants state that the Decedent’s attorney created a “solution” for the Decedent to withdraw and sever all ties but retain a nominal interest in the business to prevent a huge negative tax consequence. As per the agreement, Decedent would transfer his interest to Defendants Sasson and Garelick by a bequest in his will and if that did not occur the Defendants could exercise an option to purchase the Decedent’s interests from his estate at a nominal price of \$1,000.00. Defendants aver that after the agreement the Decedent received payouts over time, was eliminated from personal guarantees of substantial business loans and he lived until his death on October 19, 2014 without any involvement or receiving any income distribution.

In December 2014 the Decedent’s will was probated in Florida and Defendant Garelick informed the Decedent’s estate of the obligations to transfer the business interests pursuant to the Agreement. After Defendant Garelick made a claim on the Decedent’s Estate, it filed a declaratory judgment in Florida and the Defendants commenced a Federal action in the Southern District of New York (Sasson v. Mann, No. 7:15-cv-06601-CS (SDNY)). The Federal action is still pending, while the Florida action was dismissed on Defendant Garelick and Sasson’s motion contesting jurisdiction and venue in Florida. In the Federal Action the Plaintiffs (Defendants in the Federal Action) interposed counterclaims on March 17, 2017 after their Motion to Dismiss was denied. The instant action was commenced three (3) days later in state court by Plaintiffs. Defendants submit that the claims in the instant action are the same as those the Plaintiffs asserted in the Federal Action as their counterclaims, except that Defendants state the claims made in the instant action are denominated as “derivative” claims, rather than “direct claims” as stated in the aforementioned Federal Action.

Pursuant to Civil Practice Law and Rules § 3211(a)(4) a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending. [Whitney v. Whitney, 57 NY2d 731, 732 (1982); DAIJ, Inc. v. Roth, 85 AD3d 959 (2d Dept 2011); Barringer v. Zgoda, 91 AD2d 811 (3d Dept 1982)]. Upon an application, the court may dismiss an action where there is substantial identity of the parties and causes of action. [Cherico, Cherico & Assoc. v. Midollo, 67 AD3d 622 (2d Dept 2009); Simonetti v. Larson, 44 AD3d 1028 (2d Dept 2007); Montalvo v. Air Dock Sys., 37 AD3d 567 (2d Dept 2007); Certain Underwriters of Lloyd's of London v. Hartford Acct & Indem., 16 AD3d 167 (1st Dept 2015)]. It is not necessary that the precise legal theories presented in the first action be presented in the second action, but rather it is sufficient that the relief sought is “the same or substantially the same.” [Kent Dev. Co. v. Liccone, 37 NY2d 899, 901 (1975); Simonetti v. Larson, 44 AD3d at 1029; Montalvo v. Air Dock Sys., 37 AD3d at 567; Liebert v. TIAA-CREFF, 34 AD3d 756 (2d Dept 2006)]. In making a determination of whether there is substantial identity “[t]he critical element is that both suits arise out of the same subject matter or series of alleged wrongs.” [Cherico, Cherico & Assoc. v. Midollo, 67 AD3d at 622; Kent Dev. Co. v. Liccone, 37 NY2d at 901; White Lights Prods. v. On the Scene Prods., 31 AD2d 90, 94 (1st Dept 1997)].

Defendants submit that the claims raised in the previously filed Federal Action and the instant State Action address the same wrongs and are sufficiently and substantially similar. According to Defendants the actions both involve the interest of the parties in the Defendant family businesses, the buy-out agreement and whether the Defendants (Plaintiffs in the Federal Action) had the authority based on the agreement to act as to the Defendant family businesses without vote of the Decedent. The Defendants concede that the parties in the two (2) actions are not exactly the same, but assert that all of the parties need not be the same for a finding that the actions are sufficiently and substantially similar. As to the causes of action within the instant complaint that pertain to the Berger Defendants, the Defendants assert that the causes of action are not relevant to the claims brought against the Sasson and Garelick Defendants.

Upon the Plaintiff's voluntary discontinuance against Defendants Sasson and Garelick, the Court need only consider the second, third and fourth causes of action, which are denominated as

“derivative” claims. However, the Defendants aver that the same claims for breach of fiduciary duty and accounting are asserted as the third, sixth and seventh Counterclaims of the Answer of the Plaintiffs in the Federal Action, as direct claims. According to Defendant, the second, third and fourth causes of action in the instant state cause of action are improperly denominated as “derivative” claims and demonstrate Plaintiffs attempt to litigate the same issue in two (2) forums. Defendants argue that by claiming the three aforementioned causes of action are “derivative” claims, the Plaintiffs are attempting to “buttress an invalid argument” that the claims weren’t and couldn’t have been brought in the Federal Action, as they would defeat diversity. In arguing that the Plaintiffs have misstated the causes of action in the instant action as “derivative,” Defendants state that the Plaintiffs claims are “direct” and personal, as they concern legal rights that allegedly belonged to the Decedent (and now belong to the Estate) and not any rights of the business entities. The Defendants assert that the distinction is apparent based on the request for damages to be paid to the Estate, not the Defendant business entities and the Plaintiff’s allegation that upon Decedent’s death the Estate owns the Decedent’s interest in the businesses and is entitled to payments and rights.

The Plaintiffs have failed to oppose Defendant Garelick, Associates of Rockland Cty, LLC and Associates of Rockland County, Inc.’s motion to dismiss. As such the instant motion was considered unopposed.

In considering the Complaint in the Federal action, the instant State action and the Plaintiff’s (Defendant in the Federal Action) Answer with Counterclaims in the Federal Action the Court has determined that both the Federal Action and the State action both involve claims against the Estate of Phillip Mann by the Plaintiff and Defendants and the family businesses named as Defendants in the instant action. Specifically, both actions address the interest of the parties in Defendants Rockland, LLC and Rockland, Inc., the underlying buy-out agreement, the same facts and the same exact time period. Further, the denomination of the causes of action in the State Action as “derivative” actions is inconsistent with the relief sought and the basis of the allegations raised in the two actions. Since, the causes of action in the State Action are improperly denominated as “derivative” actions, the Court is granting the Defendants’ motion to dismiss as to Defendants Associates of Rockland County LLC and Associates of Rockland County, Inc.

MOTION #1

The Berger Defendants filed the instant Motion to Dismiss pursuant to Civil Practice Law and Rules § 3211(a)(7) for failure to properly state a valid cause of action as a matter of law and Civil Practice Law and Rules § 3211(a)(4) as there is another action with the same parties and claims pending in federal court. In their motion the Berger Defendants assert that the four (4) causes of action against them are legally insufficient. The first two causes of action assert direct claims on behalf of the Decedent sounding in breach of fiduciary duty and aiding and abetting co-Defendants Sasson and Garelick's breach of fiduciary duty. The second two causes of action asserted against the Berger Defendants are derivative claims, which are asserted on behalf of Rockland, LLC and Rockland, Inc. sounding in breach of fiduciary duty and aiding and abetting co-Defendants Sasson and Garelick's breach of fiduciary duty.

In considering a motion to dismiss for failure to state a cause of action pursuant to Civil Practice Law and Rules § 3211(a)(7) the pleadings must be liberally construed and the sole criterion is whether from within the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The facts pleaded are to be presumed to be true and are to be accorded every favorable inference. [*Gershon v Goldberg*, 30 AD3d 372 (2d Dept 2006); *Fitzgerald v. Federal Signal Corp.*, 63 AD3d 994 (2d Dept 2009)]. When a party moves to dismiss a complaint under this sub-section the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action, and, in considering such a motion the court must determine only whether the facts as alleged fit within any cognizable legal theory. Whether a plaintiff can ultimately establish its allegations is not part of the calculus. [*Sokol v Leader*, 74 AD3d 1180 (2d Dept 2010)].

A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship.” [*EDCI, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (1st Dept 2011)].

Addressing the sixth (6th) cause of action first, Defendants argue that the direct breach of fiduciary claim against them on behalf of the Decedent fails to state a valid cause of action since Berger Defendants had no relationship, contractual or in any other manner, with the Decedent.

Defendants submit that the Berger Defendants, as counsel for co-Defendant Rockland County LLC and Rockland County, Inc. represented the entities, not the individual owners, members, shareholders or employees of the entity. Further, the Berger Defendants assert that the Plaintiffs allegation that they represented the co-Defendant entities (family businesses) does not give rise to a fiduciary duty to its members or shareholders without more. As such, the Berger Defendants aver that since the Plaintiffs have failed to demonstrate a relationship between themselves and the Berger Defendants the cause of action fails to demonstrate a fiduciary duty to the Decedent and the sixth (6th) cause of action is insufficient and should be dismissed.

Defendants further argue that even if a duty was owed to the Decedent, the sixth (6th) cause of action should be dismissed based on the Plaintiff's failure to plead the cause of action with the required particularity pursuant to *Civil Practice Law and Rules* § 3016(b) that show that the Decedent was injured as a result of the Berger Defendant's acts or omissions. Specifically, the Berger Defendants argue that the instant Complaint is silent as to how Rockland, LLC obtaining a mortgage and an amendment to Rockland, Inc's Certificate of Amendment of Incorporation resulted in an injury to the Decedent. Further, Berger Defendants argue that the Complaint fails to specifically state how the certificate was amended. According to the Berger Defendants the sole conclusion in the Complaint as to damages is that the Plaintiff had to pay legal and other fees.

In opposition the Plaintiff argues that the Berger Defendants have a fiduciary duty to the Decedent based on the Decedent's membership in the two entities (Rockland, LLC and Rockland, Inc.) and that there need not be any contractual or specific attorney-client relationship. As to the damages argument, the Plaintiff asserts that the instant Complaint sufficiently demonstrates the injury suffered by the Decedent due to the Berger Defendants' actions. In their opposition the Plaintiff expands on his allegations as stated in the Complaint, indicating that the mortgage transaction was a complicated and garnered a lot of money for the members of the co-Defendant entities. Based on those allegations, Plaintiff asserts that the Complaint alleges an improper conversion of refinance proceeds as the damages to the Plaintiff Estate in the instant action. According to Plaintiffs the manner in which the refinance was done and the fact that the Decedent was not informed or included reduced the co-Defendant entities income, increased the liabilities and devalued the assets.

Upon a motion to dismiss for failure to state a cause of action under Civil Practice Law and Rules §3211(a)(7), the court must determine whether from the four corners of the pleading factual allegations are discerned which taken together manifest any cause of action cognizable at law. The Court should view the allegations in the complaint as true and accord plaintiffs the benefit of every reasonable inference and in determining such a motion [Fitzgerald v. Federal Signal Corp., 63 AD3d 994 (2d Dept 2009)]. The Court finds that the complaint does state a cause of action for breach of fiduciary duty against the Berger Defendants.

Nonetheless, the Court has considered the arguments raised throughout the five (5) motions before it and based on the posture of the currently pending litigation in the Southern District of New York the remaining cause of action against the Berger Defendants is stayed pursuant to Civil Practice Law and Rules § 2201 until further order of this Court. A stay is appropriate “even though there [is not] a complete identity of parties,” where “there [are] overlapping issues and common questions of law and fact and the determination of the propr action may dispose of or limit issues which are involved in the subsequent action. [Belopolsky v. Renew Data Corp., 41 AD3d 322, 322-3 (1st Dept 2007)]. A stay in the instant action will prevent duplicative litigation on the same issues, inconsistent decisions and the waste of judicial resources.

Based on the Court’s imposition of a stay pursuant to Civil Practice Law and Rules § 2201(b) the Court declines to address the Berger Defendants’ argument for dismissal of the matter pursuant to the Civil Practice Law and Rules § 3211(a)(4).

Turning now to the seventh (7th) cause of action which asserts a direct aiding and abetting breach of fiduciary duty claim against the Berger Defendants on behalf of the Decedent and the 9th cause if action for a derivative aiding and abetting breach of fiduciary claim. The Court notes that the instant action has been voluntarily dismissed against Defendants Sasson and Garelick, for whose breach of fiduciary duty to the Decedent the Berger Defendants are alleged to have aided and abetted. Since the action has been dismissed against Defendants Sasson and Garelick and no cause of action exists for a breach of fiduciary duty as to the Decedent from Defendants Sasson and Garelick, any cause of action predicated on that breach is insufficient and must be dismissed. As such, the seventh (7th) and ninth (9th) causes of action are dismissed.

Finally, as to the eighth (8th) cause of action for a derivative breach of fiduciary duty brought

on behalf of Rockland LLC and Rockland, Inc. and the ninth (9th) cause of action for a derivative aiding and abetting breach of fiduciary claim the Court notes that as stated above the Plaintiff's causes of action for derivative claims instead of direct claims are improper. The Plaintiffs' claims are "direct" and personal, as they concern legal rights that allegedly belonged to the Decedent (and now belong to the Estate) and not any rights of the business entities. Therefore, the eighth (8th) cause of action is dismissed.

MOTION #2

Plaintiff filed a motion to disqualify Mark K. Anesh, Esq and his firm, Lewis Brisbois Bisgaard & Smith, LLP based on the argument that the Decedent had an attorney client relationship. According to Plaintiff, counsel represented the Decedent and has knowledge regarding the financial arrangements of the Defendant companies based on counsel's defense of an interpleader action in which a company sued Decedent' son individually. In opposition the Berger Defendant's counsel asserts that he never represented the Decedent and only represented the Decedent's son, Howard Mann, in an individual matter that was also related to finances of a family business. Further, Defendant's counsel clarifies that they have no documents in his firm or in his files that are those documents that Plaintiff asserts the Defendant's counsel has retained.

The decision to disqualify an attorney from representation rests with the discretion of the court. [*Cardinale v. Golinello*, 43 NY2d 288 (1977); *Lauder v. Goldhammer*, 122 AD3d 908 (2d Dept 2014)]. In deciding whether conflict of interest requires disqualification exists, the court must consider whether the lawyer or law firm that previously represented the party or entity which is seeking to disqualify that attorney, obtained, in the course of that representation confidential information which would be disclosed or could be used against the former client in the current litigation. [*Cardinale v. Golinello*, 43 NY2d at 296]. The moving party must prove an attorney-client relationship between them and opposing counsel that the matters involved in both representations are substantially related and interests of present client and former client are materially adverse. [22 NYCRR 1200.0 [Rule 1.9[a],[b],[c]]. The prior client need not establish confidential information will necessarily be disclosed during litigation, only that there is a "reasonable probability of disclosure." [*Narel Apparel v. American Utex, Intl.*, 92 AD2d 913, 914

(2d Dept 1983)]. Any doubt as to exist of conflict of interest must be resolved in disqualification. [*Rose Ocko Found v. Liebovitz*, 155 AD2d 426, 428 (2d Dept 1989)].

Here, the movants fail to demonstrate that disqualification of the Berger Defendants counsel from representing them in this action is warranted. Plaintiff has failed to demonstrate that the Decedent was represented by Mark K. Anesh, Esq. and his firm. Further, the prior representations do not appear to be substantially related and there is no interests of the Decedent's son that are materially adverse to the Decedent's Estate. As such, the Plaintiff's motion to disqualify Defendant Berger's counsel is denied.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly, it is hereby

ORDERED that Defendant Ricki H. Berger and Ricki H. Berger, P.C.'s Notice of Motion to Dismiss (Motion #1) is denied in part and granted in part consistent with the Decision and Order; and it is further

ORDERED that the Sixth (6th) cause of action as to Defendant Ricki H. Berger and Ricki H. Berger, P.C.'s is stayed pursuant to Civil Practice Law and Rules § 2201 until further order of this Court; and it is further

ORDERED that Plaintiff's Motion to Disqualify (Motion #2) is denied in its entirety; and it is further

ORDERED that Defendants Garelick, Associates of Rockland County, LLC and Associates of Rockland County, Inc. Notice of Motion to Dismiss (Motion #3) is granted in its entirety; and it is further

ORDERED that Defendant Uri Sasson's Notice of Motion to Dismiss (Motion #4) is granted in its entirety; and it is further

ORDERED that the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th and 9th causes of action are dismissed as to all

Defendants; and it is further

ORDERED that Plaintiff's Notice of Motion (Motion #5) for discontinuance as to Defendants Uri Sasson and Arnold Garelick is granted in its entirety;

ORDERED that the instant action is dismissed as to Defendant Uri Sasson, Arnold Garelick, Associates of Rockland County, LLCs, and Associates of Rockland County, Inc and the Clerk is directed to mark the matter as disposed; and it is

ORDERED that the remaining parties expeditiously provide an update upon the occurrence of an event in the pending federal litigation in the Southern District of New York that bears upon Plaintiff's Sixth (6th) cause of action, the only remaining cause of action following the Court's determinations herein.

The foregoing is the Court's Decision and Order as to Motions #1, #2, #3, #4 and #5.

Dated: New City, New York
July 23, 2018


Hon. Robert M. Berliner, J.S.C.

To:

Hoguet Newman Regal & Kenney, LLP
Attorney for Plaintiff
(via e-file)

Lewis Brisbois Bisgaard & Smith, LLP
Attorney for Defendants Ricki H. Berger and Ricki H. Berger, P.C.
(via e-file)

Drinker Biddle & Reath, LLP
Attorney for Uri Sasson
(via e-file)

Kantrowitz, Goldhammer & Graifman, P.C.
Attorney for Arnold Garelick, Associates of Rockland County, LLC and Associates of Rockland
Cty, Inc.
(via e-file)