

Justicebacker Inc. v Abeles

2019 NY Slip Op 30294(U)

February 7, 2019

Supreme Court, New York County

Docket Number: 650374/2017

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 58

-----X
JUSTICEBACKER INC., d/b/a JUSTICEBACKER.COM;
JS BARKATS PLLC; and LAW OFFICES OF
MICHAEL B. WOLK, P.C.,

Plaintiffs,

Index No. 650374/2017

-against-

ALEJANDRO ABELES a/k/a ALEX ABELES,

Defendant.

-----X
ALEJANDRO ABELES a/k/a ALEX ABELES,

Third-Party Plaintiffs,

-against-

SANNY BARKATS a/k/a SUNNY JOSEPH BARKATS;
MICHAEL B. WOLK,

Third-Party Defendant.

-----X
David B. Cohen, J.S.C.:

In this action, defendant/third party plaintiff (Abeles) moves to disqualify attorney Michael B. Wolk and the Law Offices Michael B. Wolk, P.C. from representing plaintiff, Justicebacker Inc., on the ground that they have a conflict of interest because they previously represented Abeles in related litigation, and that Michael B. Wolk will be a key witness in this litigation.

Factual and Procedural Background

Abeles is a managing member of a restaurant. The restaurant operated out of a leased space which was severely damaged by Hurricane Sandy. The landlord refused to make the necessary

repairs to the premises. As a result, Abeles hired plaintiff/third party defendant Sunny Barkat (Barkat) and his law firm plaintiff JS Barkat, PLLC (Barkat, PLLC), to represent him in three law suits and an arbitration related to the landlord's refusal to repair the damage to the leased space. On December 13, 2012, Abeles signed a retainer with Barkat and Barkat, PLLC. Pursuant to that retainer agreement, Barkat and Barkat PLLC were to be paid 25% of any recovery, or \$25,000, whichever was greater. The retainer provided that during the pendency of the litigation, Abeles was to pay Barkat PLLC an initial \$2,500, and \$1,200 per month thereafter until he paid Barkat PLLC a total of \$25,000. In the event Abeles was unable to continue making payments, Barkat PLLC would receive a 20% ownership interest in Abeles' restaurant.

On November 5, 2013, Abeles signed a second retainer agreement with Barkat and Barkat PLLC which increased the fees Abeles was to pay Barkat and Barkat, PLLC. In the new retainer agreement, Abeles agreed that Barkat PLLC would receive 40% of any recovery, required a onetime payment of \$7,500, and directed that Abeles would continue paying \$1,500 per month until he paid Barkat PLLC \$18,000.

In July 2015, Abeles began experiencing financial problems and was unable to continue making the monthly \$1,500 payments. Barkat then informed Abeles that he owned a crowdfunding company plaintiff Justicebacker Inc. (Justicebacker), through which Barkat could raise money for Abeles's living and business expenses. On August 10, 2015, Abeles signed a commercial litigation financing agreement with Justicebacker in which Justicebacker agreed to pay Abeles \$40,000 for an 18% interest in his lawsuits or \$60,000 for a 20% interest in the lawsuit. Abeles claims he never received any funds from Justicebacker.

In August 2016, Barkat informed Abeles that he had hired plaintiff Michael Wolk (Wolk)

and the Law Offices of Michael B. Wolk, P.C., (Wolk, P.C.) to help him with the lawsuits. Wolk ultimately settled the lawsuits for \$75,000. Abeles claims that he informed Wolk that he would refuse to settle the cases unless he received at least \$33,000 for himself. Abeles also claims that Barkat and Wolk told him his position was unreasonable because he owed \$52,000 to Justicebacker. At that time, Abeles had already made \$46,000 in payments to Barkat PLLC. Abeles claims that Barkat offered to waive his fee so that Justicebacker would receive \$52,000, Wolk would receive \$3,000, and defendant would receive \$20,000. Abeles states that he refused to accept that payout agreement and had Wolk negotiate with Justicebacker to reduce its claim, pursuant to the commercial litigation financing agreement, from \$52,000 to \$47,000. At that point, Abeles claims that Wolk agreed to waive his fee so that Abeles would receive \$28,000 from the \$75,000 settlement.

Abeles claims that after settling his lawsuits, Barkat and Wolk did not disburse any money to him. Rather, on January 23, 2017, plaintiffs commenced this suit, while Wolk retained the \$75,000 in his escrow account. In the first cause of action, Justicebacker seeks payment of \$53,5000 pursuant to the terms of the commercial litigation financing agreement. In the second cause of action, Justicebacker seeks the payment of its legal fees incurred by this action, pursuant to the provisions of the commercial litigation financing agreement. In the third cause of action, Barkat PLLC seeks payment of legal fees under a quantum meruit theory. In the fourth cause of action, Wolk seeks payment of legal fees as the escrowee of the \$75,000.

Issue was joined, and defendant asserted various defenses and counterclaims against plaintiffs.

In August 2017, Abeles filed a third-party complaint against Barkat and Wolk. In his first

cause of action, Abeles alleges a violation of Judiciary Law § 487 and various rules of the Rules of Professional Conduct against Barkat. In his second cause of action, Abeles asserts a cause of action alleging violation of Judiciary Law § 487 and rules 1.1(a), 1.2(a), 1.3(b), 1.4(b), 1.5, 1.6, 1.8(b), 3.1, 8.4(a), 8.4(b), 8.4(c), and 8.4(d) of the Rules of Professional Conduct against Wolk. Abeles also asserts claims of legal malpractice and breach of fiduciary duty against Barkat and Wolk and a breach of contract claim against Barkat.

On August 18, 2017, Abeles and Wolk, P.C., entered into a stipulation of discontinuance in which Wolk, P.C. agreed to discontinue all its claims in the complaint and Abeles agreed to discontinue its counterclaims. Abeles also agreed to discontinue all its third-party claims against Wolk. In the stipulation, Wolk, P.C. and Wolk also confirmed that they were not litigation counsel for Barkat or Barkat PLLC, and will not act as litigation counsel for them in the future.

Abeles now brings this application seeking to disqualify Wolk from representing Justicebacker in this case arguing that Wolk had previously represented him in his negotiations with Justicebacker during the settlement of the prior litigation. Further, Abeles argues that Wolk is an important witness in this litigation since Wolk negotiated on his behalf with Justicebacker, and Justicebacker has reneged on the negotiated agreement, and Wolk will be called as a witness regarding that negotiation.

In opposition, Wolk argues that the August 18, 2017 release signed by Abeles precludes him from seeking Wolk's disqualification since Abeles agreed to waive his breach of fiduciary duty and conflict of interest claims against Wolk. Wolk also argues that Abeles's application is untimely since it was made 11 months after the commencement of this action, when Abeles should have known that Wolk was representing Justicebacker in this action. Wolk also argues that while

he negotiated with Justicebacker on Abeles's behalf, that negotiation is not substantially related to current litigation. Here, Justicebacker is claiming that Abeles breached his agreement with Justicebacker, which is not related to Wolk's negotiation with Justicebacker seeking to have Justicebacker accept a lesser amount pursuant to that agreement in settlement of Abeles's underlying litigation.

Discussion

“[T]he disqualification of an attorney is a matter which rests within the sound discretion of the court. A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion” (*Campolongo v Campolongo*, 2 AD3d 476, 476 [2nd Dept 2003] [citations omitted]; *see Horn v Municipal Info. Servs.*, 282 AD2d 712 [2nd Dept 2001]). However, the right to be represented by counsel of one's own choosing “will not supercede a clear showing that disqualification is warranted” (*Matter of Marvin Q.*, 45 AD3d 852, 853 [2nd Dept 2007]; *see Scopin v Goolsby*, 88 AD3d 782, 784 [2nd Dept 2011]). Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety (*see Cohen v Cohen*, 125 AD3d 589, 590 [2nd Dept 2015]).

The New York Rules of Professional Conduct 1.9(a) provides:

“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing”

(Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9[a]).

A party seeking disqualification of its adversary's lawyer must prove that there was an

attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only “where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise” (*Jamaica Public Service Co. Ltd. v. AIU Ins. Co.*, 92 NY2d 631, 636 [1998] citing *Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123, 132 [1996]). Here, Abeles has raised a rebuttable presumption of disqualification by demonstrating that Wolk represented him while negotiating with Justicebacker to accept a lesser amount than was agreed to in the commercial litigation financing agreement. Yet, Wolk now represents Justicebacker on its breach of the commercial litigation financing agreement claim against Abeles. Wolk has not rebutted that presumption.

It is undisputed that Wolk represented Abeles in his negotiation seeking to have Justicebacker accept an amount less than it was allegedly entitled to under the commercial litigation financing agreement, and there is no dispute that Wolk is now representing Justicebacker on its breach of the commercial litigation financing agreement claim against Abeles. Contrary to Wolk’s claims, his representation of Abeles and Justicebacker are substantially related as they both involve Abeles’s financial obligation to Justicebacker. Moreover, it is clear that Abeles’s and Justicebacker’s interests are materially adverse.

Finally, in view of the fact that Wolk will be called as a witness to testify regarding his negotiations with Justicebacker on Abeles’s behalf, Wolk should be disqualified pursuant to the advocate-witness rules (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[a]; *Gould v Decolator*, 131 AD3d 448 [2nd Dept 2015])[motion court providently exercised its discretion in granting the defendants’ motion to disqualify attorneys from representing the plaintiff pursuant to

the advocate-witness rules]).

Wolk argues that the August 18, 2017 stipulation of settlement prevents Abeles from seeking his disqualify since Abeles agreed to waive all his counterclaims and claims in his third-party complaint, including his breach of fiduciary duty and conflict of interest claims, against Wolk and Wolk, P.C. However, contrary to Wolk's arguments, Abeles did not assert any claims alleging that Wolk violated the Rules of Professional Conduct rule 1.9(a) and 3.7(a), in his counterclaims or his third-party complaint. Therefore, the stipulation of discontinuance did not waive those claims. Further, Abeles did not waive his right to seek disqualification of Wolk on any grounds.

Wolk also argues that Abeles waived his right to seek disqualification since he waited almost 11 months to make this application during the middle of litigation. If a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation (*see Hele Asset, LLC v S.E.E. Realty Assocs.*, 106 AD3d 692 [2nd Dept 2016]).

However, contrary to Wolk's contentions, while the complaint was filed on January 23, 2017, it appears that nothing happened in this litigation from then until Abeles filed the third-party complaint in July 2017. Further, the stipulation of discontinuance between Wolk, Wolk, P.C. and Abeles was entered on August 18, 2017, and Abeles's application for disqualification was made on December 22, 2017. In view of the fact, that no discovery was exchanged between Justicebacker and Abeles from the time after the complaint was filed to the time Abeles made his disqualification application, it cannot be said that the application was made in the middle of litigation (*cf.*, *Potters v 71st St. Lexington Corp.*, 8 AD3d 198 [1st Dept 2004] [granting an eve of trial motion to

disqualify attorney would prejudice plaintiff tenant]). Further, in view of the fact that this court holds that Wolk has a conflict of interest, that he will be called as a witness by Abeles, and to avoid any appearance of impropriety, the court exercises its discretion and grants Abeles's application to disqualify Wolk from representing Justicebacker in this litigation (*see Dolgoff v Projectavision, Inc.*, 235 AD2d 311 [1st Dept 1997]).

Accordingly, it is

ORDERED that defendant/third-party plaintiff's motion to disqualify counsel for plaintiff Justicebacker, Inc., is granted and Michael Wolk, Esq. is hereby disqualified from representing plaintiff Justicebacker, Inc. in this matter; and it is further

ORDERED that counsel for movant, within 21 days after entry of this order, shall serve a copy of this order with notice of entry upon counsel for all other parties and upon plaintiff Justicebacker, Inc.; and it is further

ORDERED that the action is stayed from this date until 30 days after service of a copy of this order with notice of entry upon counsel for all parties and upon plaintiff Justicebacker, Inc., who shall, within said period, retain another attorney in place of the attorney named above; and it is further

ORDERED that the new attorney retained by plaintiff Justicebacker, Inc. shall serve upon all parties a notice of appearance and file same with the Clerk of the General Clerk's Office (60 Centre Street, room 119) and the Clerk of the Part within said 30-day period; and it is further

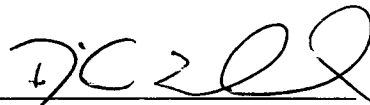
ORDERED that such filing with the Clerk of the General Clerk's Office and the Clerk of the Part shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on

the court's website at the address www.nycourts.gov/supmanh); and it is further

ORDERED that counsel are directed to appear for a conference in Room 574,
111 Street on APRIL 3 2019, at 9:30 AM/~~PM~~.

DATED: 2-7-2019

ENTER:



J.S.C.

HON. DAVID B. COHEN
J.S.C.