

**Toma v Karavias**

2019 NY Slip Op 31150(U)

April 24, 2019

Supreme Court, Kings County

Docket Number: 500687/18

Judge: Debra Silber

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9

ROBERT TOMA and NOID EVENTS, INC.,

DECISION / ORDER

Plaintiffs,

ACTION # 1

-against-

Ind. No. 500687/18

Mot. Seq. # 3

GEORGE KARAVIAS, MARIO COSTANTINI  
and USA TEENS, LLC,

Defendants.

ROBERT TOMA and NIGHTGLOW TOUR, LLC,

ACTION # 2

Plaintiffs,

Ind. No. 511393/18

Mot. Seq. # 3

-against-

GEORGE KARAVIAS, MARIO COSTANTINI  
and OFF CAMPUS PRESENTS, LLC,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' orders to show cause to disqualify Carlos M. Carvajal, Esq. as attorney for plaintiffs.

Papers	NYSCEF Doc.
Order to Show Cause and Exhibits.....	<u>38-56, 28-46</u>
Affirmation in Opposition and Exhibits.....	<u>57-61, 47-51</u>
Reply .....	

**Upon the foregoing cited papers, the Decision/Order on these motions is as follows:**

In these two related commercial actions, counsel for defendants moves, by two Orders to Show Cause, for an order disqualifying Carlos M. Carvajal, Esq. ("Carvajal"),

counsel for plaintiffs, from representing plaintiffs. Mr. Carvajal, whose disqualification is sought, opposes both motions. For the reasons which follow, the motions are both denied.

The instant actions arise out of a business dispute. Plaintiffs claim defendants were "partners" with plaintiffs then took information and equipment from plaintiffs and started new businesses in direct competition with plaintiffs' businesses, among other claims.

The stated basis for seeking disqualification of Carvajal lies in the defendants' claim that he represented defendant Karavias in a separate action in New York County Civil Court, an action for counsel fees, Ind. 4746/17.

In the Civil Court action, an attorney (Jacobson) brought a claim for counsel fees and named as defendants the individual plaintiff in these actions and one of the individual defendants (Karavias) in these actions as well as several business entities, only one of which is a party herein, NOID Events, Inc. The summons (Exhibit I) is dated February 21, 2017, almost a year before the commencement of the instant actions. Carvajal answered the Civil Court action on behalf of all named defendants, then moved to be relieved as attorney for Karavias once the instant actions were filed and served, which motion was mooted when the plaintiff in the Civil Court action (Jacobson) discontinued his action as against Karavias.

Carvajal argues in his affirmation that there was never an attorney-client relationship between himself and Karavias, and that Karavias never imparted any confidential or secret information to him. In fact, Carvajal claims he has never spoken to Karavias, and that while he answered the complaint on behalf of all defendants, he

only communicated with Toma (plaintiff herein) as representative of the defendants in that suit. At oral argument, Karavias' attorney acknowledged that Karavias had never spoken to Carvajal. It is not disputed that Carvajal never requested nor obtained any letter of engagement from Karavias.

### DISCUSSION

A party seeking disqualification of its adversary's lawyer has the burden of proving: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, [and] (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse." *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 98 (1st Dept 2008); *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631 (1998). "Only where the movant satisfies all three inquiries does the irrebutable presumption of disqualification arise." *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 132 (1996). Movants have not met their burden with respect to all of these required elements.

An attorney-client relationship "arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services." *Matter of Priest v Hennessy*, 51 NY2d 62, 68-69 (1980). "Formality is not essential to create a legal services contract. Therefore, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed." *Talansky v Schulman*, 2 AD3d 355, 358 (1st Dept 2003); *see also Wei Cheng Chang v Pi*, 288 AD2d 378 (2d Dept 2001), *lv. denied* 99 NY2d 501 (2002); *McLenithan v McLenithan*, 273 AD2d 757 (3d Dept 2000). "[M]ore than mere generalized assertions are required to justify disqualification." *Waehner v Northwest Bay Partners, Ltd.*, 30 AD3d 799, 800 (3d Dept

2006).

The facts presented here, including Karavias' affidavit, support the conclusion that Karavias was never Carvajal's client. Karavias presents only conclusory claims that an attorney-client relationship existed between the parties. In the absence of an attorney-client relationship, "the irrebutable presumption of disqualification does not arise," and the motion must be denied. *Gordon v Skyline Aviation, Inc.*, 28 Misc3d 1235(A) [Sup Ct, NY Co 2010] (denying motion for disqualification on ground that no attorney-client relationship existed).

In addition, it is clear that the legal matters at issue are not related. Counsel will only be disqualified "where the party seeking that relief meets his burden by establishing a substantial relationship between the issues in the [present] litigation and the subject matter of the prior representation." *Matter of Prudential Sec. v Wyser-Pratte*, 187 AD2d 306, 307 (1st Dept 1992); *Lightning Park v Wise Lerman & Katz*, 197 AD2d 52 (1st Dept 1994).

In order to meet the substantial relationship test, the issues in the present litigation must be "identical to" or "essentially the same as" those in the prior case before disqualification will be granted. *Lighting Park, Inc.*, 197 AD2d at 55. However, the dispute between plaintiff and Karavias in this action is not related at all to the dispute between attorney Jacobson and NOID Events, Inc. and its shareholders.

Karavias' failure to demonstrate any substantial relationship between Carvajal's current representation of plaintiffs and his brief prior representation of Karavias, without more, warrants denial of his disqualification motion. See *Jamaica Pub. Serv. Co.*, 92 NY2d at 637 ("There being no evidence of a substantial relationship between (the attorney's) past and current representation, on that ground alone, no violation of DR 5-108 (A) (1) was

demonstrated"). Here, Karavias has not met that burden, and the motion for disqualification is denied on this ground as well (the second requirement).

Accordingly, the motions for disqualification are denied.

This constitutes the decision and order of the court.

Dated: April 24, 2019

**ENTER:**



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**Hon. Debra Silber, J.S.C.**

**Hon. Debra Silber  
Justice Supreme Court**