

AP MA Funding, LLC v Lipschutz
2019 NY Slip Op 32360(U)
August 5, 2019
Supreme Court, New York County
Docket Number: 651568/2018
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

-----X			
AP MA FUNDING, LLC,		INDEX NO.	651568/2018 & 651570/2018
Plaintiff,		MOTION DATE	07/24/2019
- v -		MOTION SEQ. NO.	004 & 005
AVI LIPSCHUTZ and LARRY LIPSCHUTZ			
Defendants.			

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 163, 164, 165, 166, 167, 168, 169

were read on this motion to/for DISQUALIFY COUNSEL

HON. BARRY R. OSTRAGER:

Plaintiff AP MA Funding, LLC (“AP MA”) commenced two related breach of guaranty actions stemming from a failure to repay two loans. In the first action (No. 651568/2018), AP MA alleges that defendant Avi Lipschutz (“Avi”) breached an unconditional guaranty in connection with a \$6.85 million loan to be used to acquire a skilled nursing facility (“West Revere”). In the second action (No. 651570/2018), AP MA alleges that defendants Avi and Larry Lipschutz (“Larry”) breached an unconditional guaranty in connection with a separate \$10.5 million loan to be used to acquire a different skilled nursing facility (“Braemoor”).

Defendant Avi now moves to disqualify plaintiff’s counsel, Blank Rome LLP, from prosecuting these two actions because of alleged conflicts of interest. For the reasons stated herein, the motions to disqualify Blank Rome as counsel for plaintiff are granted.

Discussion

“Attorneys owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship.” *Kassis v. Teacher’s Ins. & Annuity Assn.*, 93 N.Y.2d 611, 615 (1999). “It is this duty that provides the foundation for the well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or substantially related matter.” *Id.* at 615-616. “These same principles give rise to the general rule that, where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation.” *Id.* at 616.

Throughout this litigation, plaintiff has been represented by Paige Tinkham and William Dorsey of the law firm Katten Muchin Rosenman LLP. Several weeks ago, Ms. Tinkham and Mr. Dorsey moved from Katten Muchin to the law firm of Blank Rome LLP.

Defendant asserts that Leon Barson, a Blank Rome partner, previously represented defendant Avi Lipschutz in connection with the loans and guarantees for the two nursing facilities at issue in these proceedings—Braemoor and West Revere. Thus, defendant moves to disqualify Blank Rome as counsel for plaintiff because Blank Rome allegedly represented Avi in the same matters, or substantially related matters, now pending before this Court.

Plaintiff argues that Blank Rome never represented Avi in any matter and did not represent any client in any matter substantially related to these actions. Plaintiff asserts that its representation of Avi was limited to restructuring of a loan made by a group of lenders (including plaintiff) to four LLCs that operated skilled nursing facilities: Merrimack Valley Health Center, LLC; Waban Health Center, LLC; Worcester Health Center, LLC; and

Watertown Health, Center LLC (collectively, the “Villages”). The Villages, plaintiff asserts, are not the nursing facilities for which plaintiff provided the loans guaranteed by Avi and at issue in this litigation.

The Court finds, however, that the email communications defendant submitted show that Avi sought legal advice from Blank Rome partner Leon Barson with respect to several loans related to this matter, including the loans for Braemoor and West Revere—the two facilities directly at issue in these actions.

In one communication, Avi seeks advice from Blank Rome partner Leon Barson regarding appraisals of Braemoor and West Revere. (*See* Lipschutz Aff. Ex. G [NYSCEF Doc. 89]). In another email exchange, Avi seeks advice from Barson regarding a proposed forbearance agreement for the Braemoor facility. Barson replies by saying he “will call [Avi] to discuss.” (*See* Lipschutz Aff. Ex. H [NYSCEF Doc. 90]).

At a minimum, these communications tend to show that Blank Rome provided Avi with legal advice in a matter substantially related—if not largely the same—as the matters pending before this Court in which Blank Rome presently represents a client, AP MA, now suing Avi. Blank Rome cannot represent AP MA in an action against Avi for breach of guaranty after providing legal advice to Avi with respect to the underlying loans and related agreements.

Accordingly, it is hereby

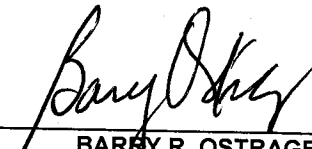
ORDERED that defendant’s motions to disqualify are granted; and it is further

ORDERED that plaintiff retain new counsel within twenty days of this decision; and it is further

ORDERED that AP MA’s motions for summary judgment as against defendant Avi will be marked denied without prejudice to renewal; and it is further

ORDERED that should new counsel wish to make a summary judgment motion, such motion must be filed by order to show cause on or before September 3, 2019; and it is further ORDERED that the September 26, 2019 trial date remains; and it is further ORDERED that the parties appear for a pre-trial conference on September 10, 2019 at 9:30 a.m.

8/5/2019
DATE


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE