

**Pinnacle Sports Media & Entertainment, Inc. v
Greene**

2020 NY Slip Op 30448(U)

February 7, 2020

Supreme Court, New York County

Docket Number: 650046/2015

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON

PART IAS MOTION 42EFM

Justice

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INDEX NO. 650046/2015

PINNACLE SPORTS MEDIA & ENTERTAINMENT, INC.,

MOTION DATE 02/13/2019

Plaintiff,

MOTION SEQ. NO. 011

- v -

LESLIE GREENE, ADAM PAZ,

DECISION + ORDER ON MOTION

Defendant.

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LESLIE GREENE

Third-Party
Index No. 595165/2015

Plaintiff,

-against-

PETER ANSKE, VICTOR MURO, FINANCIAL INTEGRITY STRATEGIES, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 276, 277, 278, 279, 280, 281, 282, 283, 284

were read on this motion to/for DISQUALIFY COUNSEL

In this action, inter alia, for breach of a management agreement, the defendant/third-party plaintiff, Kai L. Greene (Greene), moves for an order disqualifying Ropers, Majeski, Kohn & Bentley (RMKB) as attorneys for the plaintiff Pinnacle Sports Media & Entertainment Inc. (Pinnacle), and third-party defendant Peter Anske (Anske) on the grounds that it previously represented Greene with respect to contracts, agreements, and business opportunities that Pinnacle and RMKB negotiated on Greene's behalf. Pinnacle and Anske oppose the motion. The motion is denied.

Greene, a professional bodybuilder, was managed by Pinnacle and its owner/president Anske from January 10, 2014 to December 8, 2014 when Greene terminated the relationship. Pinnacle commenced this action against Greene on January 7, 2015 alleging Greene breached

his business management agreement by terminating Pinnacle. Greene filed an answer with counterclaims on February 27, 2015 alleging, *inter alia*, fraud, fraudulent inducement, and breach of contract, claiming that Pinnacle had made false representations regarding their expertise, years of experience and existence, and capabilities in the sports and entertainment management industry. Greene thereafter filed a third-party complaint against Anske on March 6, 2015. On November 14, 2018, Greene filed the instant motion seeking to disqualify RMKB based upon its previous representation of Greene in contract negotiations and other agreements.

First, Greene has waived his right to challenge Pinnacle's representation by RMKB by waiting until such a late juncture to seek this relief. "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, the party may be found to have waived any objection to the other party's representation." Hele Asset. LLC v S.E.E. Realty Assoc., 106 AD3d 692, 694 (2nd Dept. 2013). Here, the claimed prior relationship with RMKB took place in 2014 and the facts underlying the alleged conflict were thus known to the plaintiff at least three years prior to its motion to disqualify. See Matter of Valencia v Ripley, 128 AD3d 711 (2nd Dept 2015); Abselet v Satra Realty, LLC, 85 AD3d 1406 (3rd Dept. 2011). Greene proffers no explanation for the delay. In any event, Greene fails to meet his burden to disqualify RMKB.

A party who moves to disqualify the attorney for an adverse party on the ground of conflict of interest has the burden of establishing that: (1) he or she had previously been represented by that attorney, and (2) the attorney's activities in the pending legal matter would impinge on the movant's interests as a former client that the attorney had once been retained to advance or protect, or (3) the matters embraced in the pending matter are substantially related to the to the prior matters that the attorney handled on the movant's behalf, or (4) the attorney had access to confidential materials substantially related to the pending litigation, or (5) the attorney has a direct and substantial stake in the outcome of the pending litigation. See District Council 37 v Kiok, 71 AD2d 587, 587 (1st Dept. 1979); see also Saftler v Government Empls. Ins. Co., 95 AD2d 54, 57 (1st Dept. 1983). Campbell v McKeon, 75 AD3d 479 (1st Dept. 2010); 22 NYCRR 1200.0.

"When considering a motion to disqualify counsel, a trial court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of

his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation." Ferolito v Vultaggio, 99 AD3d 19, 27 (1st Dept. 2012) *quoting* Abselet v. Satra Realty, LLC, 85 A.D.3d 1406 (3rd Dept. 2011); *see also* Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123 (1996). In the absence of a violation of an ethical or disciplinary rule, the mere appearance of impropriety alone is insufficient to warrant disqualification, and, in any event, any appearance of impropriety must be balanced against a party's right to the counsel of its choice as well as the possibility that the motion for disqualification may be motivated purely by tactical considerations. See Develop Don't Destroy Brooklyn v Empire State Dev. Corp., 31 AD3d 144, 153-154 (1st Dept. 2006). Key to this analysis is that "[d]isqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." Tekni-Plex, Inc. v Meyner & Landis, *supra* at 131.

In support of his motion, Greene submits no affidavit of his own but submits an affirmation by his attorney Carlene Jadusingh, a series of communications reflecting contracts negotiated by RMKB involving Greene, and invoices to Greene from Pinnacle that charge him for legal services performed by RMKB. Since plaintiff's counsel claims no personal knowledge of the underlying facts, the contents of her affirmation are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). Moreover, these submissions fall short of establishing that there was an attorney-client relationship between Greene and RMKB, as the movants' submissions show only that Pinnacle retained RMKB as counsel to provide legal services relating to the negotiation of contract language for business opportunities for a number of Pinnacle's clients, including Greene, and other matters. Greene makes no allegations that he ever met with anyone from RMKB and does not claim that he believed at that time that he had any attorney-client relationship with them. Nor does he demonstrate that the matters involved in the prior "representation" are substantially related to RMBK's representation of Pinnacle and Anske in this action. As observed by Pinnacle in opposition, at issue here is the alleged breach of a contract between Pinnacle and Greene, or the fraudulent inducement of Greene to enter the contract, which contract which was signed prior to Pinnacle's retention of RMKB.

Accordingly, it is,

ORDERED that the motion of the defendant and third-party plaintiff, Kai L. Greene to disqualify Ropers, Majeski, Kohn & Bentley (RMKB) as attorneys for the plaintiff Pinnacle Sports Media & Entertainment Inc., and third-party defendant Peter Anske is denied; and it is further,

ORDERED that the parties are to appear for a status/settlement conference on April 9, 2020 at 3:00 p.m.

This constitutes the Decision and Order of the Court.

2/7/2020
DATE


NANCY M. BANNON, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

HON. NANCY M. BANNON