All-Ways Forwarding Intl. Inc. v iApparel, LLC

2020 NY Slip Op 33368(U)

October 14, 2020

Supreme Court, New York County

Docket Number: 650413/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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ALL-WAYS FORWARDING INT'L INC.,

Plaintiff,

- v -

IAPPAREL, LLC,LR ACQUISITION, LLC,HARRY CATTON

Defendant.

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INDEX NO. 650413/2020

MOTION DATE 10/08/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISQUALIFY COUNSEL.

The motion by defendants to disqualify plaintiff's attorney is granted.

Background

This breach of contract action arises out of a dispute concerning a shipment of socks. Plaintiff, an international freight forwarder, contends that it received nearly 4,000 cartons of socks from a supplier for shipment to the U.S. to fill an order placed by defendants. Plaintiff alleges that a representative of defendants promised plaintiff that if the goods (once they had arrived in New York) were released without certain releases or original bills of lading, defendants would provide evidence of payment to the supplier for the merchandise.

Plaintiff insists that defendants never followed through with this promise and the supplier sent plaintiff a demand letter for the release of the merchandise for over $280,000. It also points out that a Court in China held that plaintiff is indebted to the supplier for over $280,000.

Defendants move to disqualify plaintiff's counsel ("Lazarus") from representing plaintiff. They claim that they used Lazarus as counsel in connection with a licensing opportunity in May

2018. Defendants contend they revealed confidential communications with Lazarus, including the corporate structure of each of the corporate defendants and their assets. They point out that the claims against defendants include assertions about alter ego and fraud and, therefore, defendants are concerned about confidential communications being used against them.

In opposition, plaintiff contends that its firm represented only one of the defendants in an unrelated and brief failed transaction in May 2018. It claims that there is no conflict of interest with Lazarus and that defendants cannot meet their heavy burden to disqualify counsel. Plaintiff maintains that no confidential or privileged information was revealed to Lazarus during the May 2018 representation and the failed transaction has no relation to this case.

In reply, defendants argue that they sought legal services regarding the potential business transaction and that Lazarus began reviewing draft agreements. They insist that the nature of the potential licensing agreement gave Lazarus access to confidential information, which defendants fear can be used against them in this case.

Discussion

"A party attempting to disqualify an attorney under DR 5–108(a)(1) must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (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. When the moving party is able to demonstrate each of these factors, an irrebuttable presumption of disqualification follows" (*Pellegrino v Oppenheimer & Co., Inc*., 49 AD3d 94, 98, 851 NYS2d 19 [1st Dept 2008] [internal quotations and citations omitted]).

"The duty not to divulge a former client's confidences under DR 5–108(a)(2) is broader than the attorney-client privilege. Consequently, it is not necessary for a party seeking

disqualification to show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice. However, disqualification has been found inappropriate either where there is no substantial relationship [between the issues in the current and former litigation] or where the party seeking disqualification fails to identify any specific confidential information imparted to the attorney" (*id*. [internal quotations and citations omitted]).

The Court grants the motion. There is no dispute that there was an attorney-client relationship between plaintiff's counsel and defendant iApparel or that the interests of Lazarus' present client (plaintiff) are materially adverse to this defendant. After all, plaintiff is suing this defendant. The question, then, is whether the matters are substantially related such that disqualification is required.

The affidavit of Mr. Catton, the owner and managing member of the corporate defendants, (and the father of the individual defendant) establishes that disqualification is necessary. He observes that these entities are small companies and that he used Lazarus concerning the potential acquisition of a troubled brand called Avalanche (NYSCEF Doc. No. 13 at 1-2). Mr. Catton explains that he was considering buying Avalanche's assets through a UCC Article 9 foreclosure and sale, and that they used Lazarus to review the corporate structure of iApparel and defendant LR Acquisition, LLC (*id*. at 3). He observes that the potential acquisition required an analysis of how Avalanche would be integrated into defendants, the future corporate structure after the acquisition and the financial capabilities of the corporate defendants (*id*.).

The Court has no doubt that Lazarus had access to confidential financial information concerning the defendants, including details about the corporate structure of defendants. In this

lawsuit, plaintiff included an entire section in the complaint about how defendants iApparel and LR Acquisitions are alter egos (NYSCEF Doc. No. 1 at 2-3). In fact, plaintiff pled that both entities have "the same ownership and management" and "Upon information and belief, iApparel maintained exclusive control over the profits of LRA" (*id*. ¶¶ 11, 15). Plaintiff also contends that the corporate defendants "commingled funds," "act as one economic entity" and that iApparel exercised complete domination and control over LRA" (*id*. ¶¶ 16, 17, 14).

There is a reasonable inference that this information was acquired by Lazarus during its representation of defendants. As Mr. Catton points out, defendants are tiny companies; this is not a case involving a public company where such information might be easily obtained. The purpose of disqualification under these circumstances is "to safeguard client confidences and to free the former client from any apprehension that they will be used to the client's detriment in another matter" and "to avoid an appearance of impropriety on the part of the attorney or the law firm" (*Pellegrino*, 49 AD3d at 98 [internal quotations and citations omitted]).

The basic facts are clear. Plaintiff is represented by counsel that previously represented one of the corporate defendants. That prior representation necessarily involved access to confidential information about how defendants are structured, operate and their finances. After all, the transaction involved the potential acquisition of another company. The Court finds that under these circumstances, disqualification is required. A client should not have to fear that an attorney it previously used to analyze its corporate structure would be able to use that information to craft claims against it in a future lawsuit. And, here, the causes of action substantially relate to the information gained; plaintiff brings fraud claims and raises corporate veil theories. Those types of claims rely on specific facts about how a company operates, information that Lazarus could have obtained during its representation of defendants.

Accordingly, it is hereby

ORDERED that the motion by defendants to disqualify plaintiff's counsel, Lazarus & Lazarus P.C., from representing plaintiff is granted and the Court declines to award movants any fees in connection with this motion; and it is further

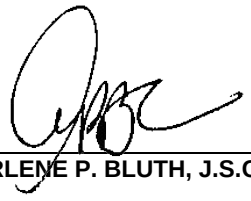
ORDERED that counsel for the movants, within 21 days after the entry of this order, shall serve a copy of this order with notice of entry upon counsel for all other parties and upon plaintiff; and it is further

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, 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 shall serve (electronically) 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/supctmanh)].

Remote Conference: February 3, 2021.



10/14/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE