Rolnitzky v Tyrnauer
2021 NY Slip Op 31823(U)
May 27, 2021
Supreme Court, Kings County
Docket Number: 517715/19
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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JOSEPH ROLNITZKY a/k/a YOSSI COHEN,

Plaintiff, Decision and order

- against - Index No. 517715/19

SIMON TYRNAUER, YOEL PERL & 781 BROOKLYN LLC,

Defendants, May 27, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3126 seeking to strike the defendants answer for the failure to adequately comply with discovery. The defendants oppose the motion and has cross-moved seeking to disqualify plaintiff's counsel. That motion is opposed by the plaintiff. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order the plaintiff has sued the defendants alleging they have not provided him his share of the profits pursuant to an operating agreement executed on August 14, 2017. Further, the plaintiff asserts the defendants Tyrnauer and Perl submitted forged documents in efforts to obtain a mortgage. Essentially, the plaintiff has accused the defendants of diverting corporate assets. Discovery demands were served on July 6, 2020 and a followup good faith letter a month later seeking discovery. The plaintiff now moves arguing the defendants have not complied with any discovery. Indeed, in an

order dated January 4, 2021 the court held that " in the event Defendants fail to fully respond to the Demand for Discovery and Inspection and the interrogatories on or before February 1, 2021, the Answer filed by Defendants shall hereby be stricken without the need for further motion" (see, Order dated January 4, 2021). Thus, the plaintiff seeks to strike defendants answer. Further, the defendants have cross-moved seeking to disqualify plaintiff's counsel on the grounds that plaintiff's counsel's law firm has employed an associate who used to work for defense counsel and while employed by defense counsel drafted a memo in this very case. At the time the associate worked for defense counsel he was only a law student and not an admitted attorney.

Conclusions of Law

It is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that such right may not be abridged without some overriding concern (Matter of Abrams, 62 NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing party's counsel must present sufficient proof supporting that determination (Royner v. Rantzer, 145 AD3d 1016, 44 NYS3d 172 [2d Dept., 2016]).

The former client conflict of interest rule is codified in the New York Rules of Professional Conduct, Rule 1.9 (22 NYCRR

§1200.0 et. seq.). Specifically, Rule 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..." (id). Further, Rule 1.10(a) states that "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein" (id). Comment 4 to Rule 1.10 states that "the rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect" (id). Other states specifically include law students within the category of individuals that do not disqualify the law firm. For example, Comment 4 to Rule 1.10 of the Hawaii Rules of Professional Conduct, which essentially mirrors the New York Rule states that "nor does paragraph (a) necessarily prohibit representation if the lawyer is prohibited from acting because of the events before the person became a lawyer, for example, work

that the person did while a law student" (id). Like New York, the Hawaii rule requires a screening process to avoid communications of any possible confidential information.

Naftaly Weisz, the associate in question submitted an affirmation wherein he states "as part of joining Gutman Weiss, P.C., I engaged in a screening process in which the Firm and I discussed potential conflicts based upon my prior work at The Law Office Barry R. Feerst & Associates...Relevant cases were identified, and it was arranged that I take no part in handling those cases. In addition, a policy was adopted under which those cases would not be discussed by other staff members of Guttman Weiss with me, apart from those conversation relating directly to the issues of potential conflict themselves" (see, Affirmation of Naftaly Weisz, ¶¶8,9). The defendant argues that it is doubtful "that anybody from the Gutman firm will state under oath that Mr. Weisz has had no part in the Tyrnauer case. Indeed, the mere appearance of the conflict mandates disqualification" (see, Affirmation in Support of Cross-Motion, ¶20). However, that conclusory assertion is inapplicable where Mr. Weisz was only employed as a law student. As a nonlawyer the rule is relaxed, especially where as here he underwent a screening process to insure no conflict would arise.

Therefore, based on the foregoing the motion seeking to dismiss plaintiff's counsel is denied.

Turning to the motion seeking a default, the defense counsel has asserted the failure to provide timely responses should not devolve upon the client and that in any event the interrogatories served exceeded the statutory number. It is true that §202.20 of the Uniform Rules for New York State Trial Courts states that "Interrogatories are limited to 25 in number, including subparts, unless the court orders otherwise" (id). The court has reviewed the interrogatories and in the court's discretion all the interrogatories are proper and the defendants must respond to all of them. The defendants have thirty days from receipt of this order to respond to all the interrogatories. The failure to do so will result in an automatic default and the scheduling of an inquest.

So ordered.

ENTER:

DATED: May 27, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC