ZW Acquisition LLC v Volkov
2022 NY Slip Op 33295(U)
September 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 500199/2022
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 KINGS : CIVIL TERM: COMMERCIAL 8

ZW ACQUISITION LLC, Individually and Derivatively On Behalf of ZELDA WIGS, INC.,

Plaintiff, Decision and order

- against - Index No. 500199/2022

ZELDA VOLKOV,

Defendant,

- and - September 29, 2022

ZELDA WIGS, INC,

Nominal Defendant

PRESENT: HON. LEON RUCHELSMAN

The defendant Zelda Volkov has moved seeking to disqualify the attorney of plaintiff, Ethan Kobre Esq. and the Law Firm of Schwartz Sladkus Reich Greeberg Atlas LLP on the grounds these attorneys represented the defendant in a stock purchase agreement and thus a conflict of interest has arisen. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Zelda Wigs Inc., was originally owned equally by Zelda Volkov and Shneur Korenblit. Mr. Korenblit agreed to sell his fifty percent share to Ari Turk the principal of the plaintiff. On April 14, 2021 a stock purchase agreement was entered into between the plaintiff and Zelda Wigs Inc., whereby the plaintiff would replace Mr. Korenblit as half owner of the entity. Ethan Kobre Esq. and the Law Firm of Schwartz Sladkus Reich Greeberg Atlas LLP was hired to prepare the documents. A retainer agreement was

executed and the nature of that agreement is the subject of this motion. A lawsuit was filed by the plaintiff alleging that since the agreement was negotiated the defendant Ms. Volkov has refused to communicate with the plaintiff and has essentially shut the plaintiff out of the business. The complaint alleges causes of action for an injunction, breach of fiduciary duty, breach of contract, fraud, conversion, unjust enrichment and other claims. The defendant Zelda Volkov has now moved seeking to disqualify Mr. Kobre and his firm arguing that they represented her in a personal capacity and that therefore they cannot represent the plaintiff in a lawsuit against her since an obvious conflict exists. The plaintiff counters no such personal representation existed, thus, the law firm may represent the plaintiff in this action against the defendant.

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 (Rovner 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). Although a hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest (Olmoz v. Town of Fishkill, 258 AD2d 447, 684 NYS2d 611 [2d Dept., 1999]) mere conclusory assertions are insufficient to warrant a hearing (Legacy Builders/Developers Corp., v. Hollis Care Group, Inc., 162 AD3d 649, 80 NYS3d 59 [2d Dept., 2018]).

Thus, a party seeking disqualification of counsel must demonstrate that: (1) there was a prior attorney client relationship; (2) the matters involved in both representations are substantially related; and (3) the present interests of the attorney's past and present clients are materially adverse (Moray v. UFS Industries Inc., 156 AD3d 781, 67 NYS3d 256 [2d Dept., 2017]; see, also, Falk v. Chittenden, 11 NY3d 73, 862 NYS2d 869 [2008]; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 684 NYS2d 459 [1998]). Once the moving party demonstrates that these three elements are satisfied "an "irrebuttable presumption of disqualification follows" (McCutchen v. 3 Princesses and A P Trust Dated February 3, 2004, 138 AD3d 1223, 29 NYS3d 611 [2d Dept.,

2016]).

The defendant relies upon the retainer agreement to establish the law firm represented Ms. Volkov personally, thus an examination of the retainer agreement is necessary. The retainer agreement is addressed to "Ms. Volkov and Mr. Turk" (see, Salutation to Retainer Agreement [NYSCEF Doc. #39]). The agreement commences by stating that "we are pleased that you and Zelda Wigs, Inc. (together, "Client") have retained Schwartz Sladkus Reich Greenberg Atlas LLP ("SSRGA") in connection with the stock purchase and redemption of a 50% share of Zelda Wigs, Inc. (the "Company")" (id). The defendant argues that "the letter expressly defines the client to include ***both*** the individuals and the Company" (see, Memorandum in Reply, page 3 [NYSCEF Doc. #43]). However, while the letter is addressed to Ms. Volkov as an individual, and indeed, there is no other way to address any correspondence to any person, there can be no reasonably basis to conclude the law firm represented Ms. Volkov in an individual capacity.

First, the retainer letter only contains signature blocks for Mr. Turk and Zelda Wigs Inc., by Zelda Volkov. Thus, the retainer letter did not contain any individual signature opportunity on behalf of Mr. Volkov permitting her to sign in an individual capacity. Thus, the clear intent of the retainer agreement, notwithstanding any language in the agreement addressing Ms. Volkov, indicates that no representation of Ms. Volkov was agreed

upon. In Fitzpatrick v. American International Group Inc., 272 F.R.D. 100 [S.D.N.Y. 2010] the court explained that "because the corporation is inanimate, its decisions and communications as a client, as well as for other purposes, must be made by its chosen representatives, typically its Board acting collectively or, in appropriate circumstances, its senior officers" and "although Board members may make decisions that are binding on the corporation, in doing so they act in their corporate capacities rather than as non-corporate individuals" (id). Thus, any personal reliance Ms. Volkov placed upon counsel is based upon a failure to appreciate the legal nuances of the corporate structure. This is particularly true in this case where there is no assertion by Ms. Volkov that she ever received personal advice from counsel.

In addition, there are no ambiguities contained in the retainer agreement that should be construed against the drafter (Askari v. McDermott, Will & Emery, LLP, 179 AD3d 127, 114 NYS3d 112 [2d Dept., 2019]).

The defendant next argues that she reasonably believed that Mr. Kobre was her personal attorney. However, in U.S. v. International Brotherhood of Teamsters et., al., 119 F3d 210 [2d Cir. 1997] the court declined to adopt a "reasonable belief" standard thus, objectively no attorney client relationship existed. As the court observed in S.E.C. v. Credit Bancorp, Ltd., 96 F.Supp2d 357 [S.D.N.Y. 2000] "the question is not whether it was

reasonable for" a corporate officer "to assume that corporate counsel was in effect his own counsel because he was the sole shareholder of" the entity. Rather, the individual must have "'made it clear' that he was seeking personal advice" (id). Since there is no such clarity regarding Mr. Kobre's representation, no reasonableness on the part of Ms. Volkov's subjective belief can create an attorney client relationship.

Therefore, no such relationship existed and consequently, the motion seeking to disqualify Mr. Kobre and his firm is denied.

So ordered.

ENTER:

DATED: September 29, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman