

**Atanasio v O'Neill**

2023 NY Slip Op 30669(U)

March 8, 2023

Supreme Court, Kings County

Docket Number: Index No. 502769/2016

Judge: Leon Ruchelsman

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

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PAUL ATANASIO, individually and derivatively  
as a member of SOMERSET PRODUCTION  
COMPANY, LLC,

Plaintiffs, Decision and order

- against -

Index No. 502769/2016

THOMAS O'NEILL,

Defendant,

March 8, 2023

-----x  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #9

The plaintiff has moved seeking to disqualify defendant's counsel. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In this action the plaintiff alleges that Somerset Production Company LLC amended its operating agreement to add a company half owned by O'Neill called Berea Oil and Gas Corp., which effectively allowed O'Neill to dominate Somerset. The complaint alleges O'Neill diverted Somerset's funds for his own personal use. There is no dispute that defendant's counsel Barclay Damon LLP represented Somerset in 2015 during the time of the defendant's alleged misappropriation of Somerset's funds. Thus, the plaintiff asserts that "Barclay provided legal services to both Defendant and SPC in connection with several transactions that go to the heart of Plaintiff's allegations" (see, Memorandum of Law, page 3 [NYSCEF Doc. No. 191]) and must be disqualified since an obvious conflict has presented itself.

A memorandum prepared by Barclay in September 2015 concerning a well owned by defendant is the primary basis seeking disqualification. That well is the subject of some of the allegations in the complaint. Paragraphs 29-37 of the complaint allege that an entity owned by the defendant called Cottonwood Operating Corp., was given a permit by the United States Environmental Protection Agency to conduct drilling operations in Pennsylvania. The complaint alleges the defendant charged Somerset \$250,000 for the use of that permit and that the fair market value of the permit was below that amount. Further, and in any event, the complaint alleges the defendant never even relinquished Cottonwood's rights in the well and that Somerset overpaid for something it never even enjoyed. Thus, these allegations further support the contention that defendant misused his role at Somerset and misappropriated Somerset's assets. The plaintiff asserts that Barclay was counsel to transactions conducted by the defendant and his corporation Cottonwood and that disqualification is imperative to maintain the integrity of the lawsuit.

#### 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]).

Thus, in interpreting the prior rule DR 5-108(A)(1) which is substantially the same in import, disqualification would be proper where it is established that there is a substantial relationship between the current litigation and the prior one (Kuberzig v. Advanced Dermatology, P.C., 260 AD2d 548, 688 NYS2d 596 [2d Dept., 1999]).

Thus, concerning this substantial relationship prong, in Spano v. Tawfik, 271 AD2d 522, 705 NYS2d 659 [2d Dept., 2000], the court held disqualification improper where the plaintiff's attorney suing defendant for breach of contract once represented the defendant in a trademark infringement action when plaintiff and defendant were the sole shareholders of the corporation that settled that trademark action. The court noted there was insufficient evidence the matters were substantially related. Indeed, for the two matters to be viewed as substantially related they must be 'identical to' each other or 'essentially the same' (Lightning Park, Inc., v. Wise Lerman Katz, P.C., 197 AD2d 52, 609 NYS2d 904 [1<sup>st</sup> Dept., 1994]).

The plaintiff argues that Barclay must be disqualified because "plaintiff's causes of action, in part, allege that Defendant's wrongful conduct involved unauthorized transaction(s) between Cottonwood and SPC in connection with SPC's acquisition of the Brandt Well, the benefits accruing to Defendant and detriments accruing to SPC as a result of same, and the transaction(s) by which Defendant disposed of Cottonwood and/or the well. Barclay provided legal services to SPC (and apparently Defendant) to effectuate these transactions. Barclay also drafted the Memorandum for SPC which, as an evaluation of SPC's environmental liability regarding the Brandt Well, would also relate to Plaintiff's allegations regarding the true ownership of the well or its permit" (see, Memorandum of Law, page 14 [NYSCEF Doc. No. 191]). In reply the defendant further asserts that "the ultimate sale of the well, handled by Barclay, with no involvement from any member of SPC other than Defendant, is undoubtedly related to the aforementioned issues" whether the defendant breached his duty to Somerset regarding the well (see, Memorandum in Reply, page 5 [NYSCEF Doc. No. 213]).

However, it is difficult to isolate the precise conflict which demands disqualification. As noted, the complaint alleges that the defendant overcharged Somerset for the use of a drilling permit and in fact did not even permit Somerset to enjoy the benefits of such a permit. Whether Barclay was counsel when the

well was first purchased in 1987 is irrelevant to these allegations and do not present a conflict. Further, the nature of any unauthorized "transactions" are not explained and considering the allegations of misappropriation such transactions are not related in any way and are thus not relevant. Moreover, Richard Day an attorney with Barclay submitted an affidavit wherein he asserts that neither he nor the law firm has performed any work for Somerset since 2016 and that he did not perform any legal work concerning any of the allegations contained within the complaint (see, Affirmation of Richard Day, ¶¶ 4,9 [NYSCEF Doc. No. 203]). Thus, there are no "transactions" wherein Barclay was counsel that are substantially related to the allegations in the complaint, namely whether the defendant essentially cheated Somerset out of the use of the drilling permit. The plaintiff is correct that the substantial relationship test is not tied to the four corners of the complaint (see, Memorandum in Reply, page 4 [NYSCEF Doc. No. 213]) however, the plaintiff has failed to point to any transaction where Barclay was counsel that is related to this case at all.

The plaintiff insists the memorandum prepared by Barclay further supports disqualification. The plaintiff argues that the memorandum "opines on the potential civil and criminal liability to the State of Pennsylvania of Cottonwood or SPC, and/or their officers and directors under a veil piercing theory. These issues

are related to Plaintiff's contentions in this action because Plaintiff has argued that Defendant attempted to pass-off Cottonwood's environmental liability on SPC and its members" (see, Memorandum in Reply, page 5 [NYSCEF Doc. No. 213]). The plaintiff fails to address where such contentions regarding environmental liability shifting is presented. Paragraph 36 of the complaint does allege that "Cottonwood never notified the EPA that it had allegedly assigned, transferred, or sold the permit to SPC. On the contrary, in written correspondence with the EPA, O'Neill advised that 'Cottonwood wishes to continue operations regulated by the permit after its expiration date of July 11, 2015'" (see, Complaint, ¶ 36 [NYSCEF Doc. No. 2]). However, that allegation merely bolsters the general allegation of the entire lawsuit, namely, that the defendant acted to further his own interests at the expense of Somerset. Thus, there is no allegation regarding shifting liabilities to Somerset to spare Cottonwood the consequences of such liability. Moreover, even if that allegation has been presented, in essence, that allegation merely asserts that the defendant attempted to shift liability from a company he solely owned to one he owned with others, tempering the benefit of any such pass-off. Thus, the opinions offered in that memorandum have nothing at all to do with the alleged breaches of fiduciary duty leveled against the defendant in this case.

Next, the plaintiff asserts that even if mandatory disqualification is not authorized then surely an appearance of impropriety remains if Barclay continues to represent the defendant and disqualification should be imposed on that basis. This is true, according to plaintiff, because Barclay refused to furnish the memorandum noted above on the grounds they were not authorized to do so without approval from the Somerset board of directors. The plaintiff asserts that Barclay's refusal was pretextual and exposed its desire to protect the defendant at the expense of Somerset and thus they cannot represent the defendant. However, the actual production of the memorandum undermines the argument there was any impropriety in the initial refusal to furnish it. The memorandum, which is over seven years old, surely could not be the basis for any potential fear on the part of Somerset's board of directors of any liability they could face from the any governmental agency. The possibility of governmental prosecution results from conduct not from a memorandum issued by counsel. In any event, as noted, the contents of the memorandum have nothing whatever to do with the allegations of this lawsuit, even broadening the allegations beyond the constraints of the complaint, namely whether the defendant improperly misappropriated Somerset funds or sold Somerset phantom rights to engage in digging the well. Therefore, there is no appearance of impropriety. Consequently,

the motion seeking to disqualify the defendant's counsel is denied.

So ordered.

ENTER:

DATED: March 8, 2023  
Brooklyn N.Y.



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Hon. Leon Ruchelsman  
JSC