

Aicon Art LLC v Aicon Contemporary LLC

2023 NY Slip Op 33340(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 650580/2023

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

-----X

AICON ART LLC

Plaintiff,

- v -

AICON CONTEMPORARY LLC,

Defendant.

-----X

INDEX NO. 650580/2023

MOTION DATE 09/26/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISQUALIFY COUNSEL.

Plaintiff’s motion to disqualify defendant’s attorney is granted.

Background

Both plaintiff and defendant are in the art business and, in fact, are located at the same address (an art gallery) in Manhattan. Apparently, they both lease space pursuant to a sublease from the gallery. The managers of these entities are brothers (Prajit Dutta manages plaintiff while Projjal Dutta manages defendant). The brothers used to be in business together but stopped working together around 2019.

In this action, plaintiff contends that it entered into three contracts with defendant concerning 1) sharing the proceeds of an artwork sale, 2) an agreement to share business expenses and 3) an agreement to share legal fees and expenses concerning a claim against these entities.

In this motion, plaintiff moves to disqualify defendant’s counsel (Stropheus Art Law, [“Stropheus”]). It explains that in 2013 or 2014, the gallery where both plaintiff and defendant

are based (of which both brothers are members) sold a painting by Salman Toor. The purchaser agreed to have the gallery retain possession of the painting to sell on consignment. In December 2021, the purchaser demanded that the painting be returned.

In January 2022, plaintiff argues that defendant engaged Stropheus about the purchaser's demand and that an attorney from Stropheus began working on behalf of both entities whereby the painting would be sold by defendant and the purchaser, plaintiff, and defendant would split the profits (the purchaser would get 50% while plaintiff and defendant would each get 25%). Plaintiff insists that it and defendant were to split Stropheus' retainer for legal fees and that Stropheus thereafter provided legal services on behalf of both entities.

Plaintiff contends it was provided access to Stropheus' client portal so that it could review documents prepared by Stropheus. It observes that it paid its half of the retainer fee on January 27, 2022 and points to a credit card payment it says shows it made this payment (NYSCEF Doc. No. 11). It observes that the final agreement between plaintiff and defendant, which it calls the Toor Agreement, called for an auction at Christie's and that all notices be sent to an attorney at Stropheus. Plaintiff asserts that it signed this agreement (NYSCEF Doc. No. 8).

Plaintiff alleges that the work sold for \$700,000 at auction and that, under the terms of the agreement, it was entitled to receive about \$170,000. It claims that defendant only paid it \$107,625 so it sues for the remaining amount here in this lawsuit. Plaintiff maintains that the timeline of events shows that Stropheus cannot represent defendant in this action as plaintiff seeks damages arising from an agreement that Stropheus negotiated on behalf of both plaintiff and defendant.

In opposition, defendant claims that Stropheus never had an attorney-client relationship with plaintiff. It maintains that there are no agreements or any communications in which

Stropheus represented itself as plaintiff's attorney. Stropheus also argues that even if there was some attorney-client relationship, plaintiff did not impart any confidences and there was no reasonable expectation of confidentiality. Defendant insists that plaintiff did not adequately explain how any information it may have told Stropheus in confidence would undermine its claim here.

Defendant insists that Prajit Dutta (manager of plaintiff) did not have any communications with Stropheus and that Harry Hutchison (who worked for plaintiff) curiously did not submit an affidavit despite the fact that he has personal knowledge of the facts unlike Prajit.

It contends that Stropheus negotiated an agreement with the owner of the painting that did not mention plaintiff at all and that the agreement that plaintiff references simply split the proceeds from the auction sale between plaintiff and defendant; that agreement does not reference the owner of the painting (the person who demanded return of the artwork and set in motion the eventual auction).

In reply, plaintiff insists that defendant's attempt to invent exceptions to the rule that an attorney, who jointly represented multiple clients, may not then represent one client in a lawsuit against another client involving a substantially related matter.

Discussion

“Because disqualification can affect a party's federal and state constitutional rights to counsel of his or her own choosing, the burden is on the party seeking disqualification to show that it is warranted. The court must carefully scrutinize such requests, balancing the right to counsel of one's choice against a potential client's right to have confidential disclosures made to a prospective attorney subject to the protections afforded by an attorney's fiduciary obligation to

keep confidential information secret” (*Dietrich v Dietrich*, 136 AD3d 461, 462, 25 NYS3d 148 [1st Dept 2016] [internal quotations and citations omitted]).

“An attorney traditionally has been prohibited from representing a party in a lawsuit where an opposing party is the attorney's former client. This is consistent with the long-established ethical standards in the practice of law which impose a continuing obligation upon a lawyer to preserve the confidences and secrets of his client even after the termination of his employment and which forbid the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Where, as here, a former client of an opposing party's attorney seeks disqualification of the attorney, such relief will be granted where the party seeking disqualification establishes a substantial relationship between the issues in the litigation and the subject matter of the prior representation, or where counsel had access to confidential material substantially related to the litigation” (*Cooke v Laidlaw, Adams & Peck, Inc.*, 126 AD2d 453, 456, 510 NYS2d 597 [1st Dept 1987]).

The initial, and central, question here is whether plaintiff was Stropheus’ client. There is no dispute that the subject matter of the alleged representation and this case is substantially similar (it involves proceeds arising from the sale of the Salman Toor painting). “An attorney-client relationship may arise even in the absence of a written retainer agreement, and a court must look to the words and actions of the parties to determine whether such a relationship exists” (*Edelman v Berman*, 195 AD3d 995, 997, 151 NYS3d 123 [2d Dept 2021]).

The Court finds that plaintiff established that Stropheus was its attorney and the Court therefore grants the motion. The primary factor in this Court’s decision is the request that

plaintiff pay half of the retainer agreement and plaintiff's subsequent payment of that amount. The email chain (NYSCEF Doc. No. 9) contains discussions with Projjal (defendant's manager), Harry Hutchison (who worked for plaintiff), and an attorney from Stropheus. Projjal requests that Stropheus send two requests (for \$1,500 each) for the retainer (*id.* at 5 of 7).

A Stropheus attorney responds "Dear Projjal, Let us be sure you want to do this. If he also pays then I would then be obligated to tell him everything I am telling you. Are you sure this is what you want?" (*id.* at 4 of 7). Later, Stropheus confirms it sent two invoices (*id.*) and plaintiff paid it (NYSCEF Doc. No. 11).

Defendant did not offer a sufficient reason for how this Court could ignore this email conversation or the payment. Instead, defendant argues that there was a side agreement that required plaintiff and defendant to split the legal fees and therefore Stropheus was supposed to keep plaintiff "in the loop" about finding a resolution with the purchaser. In this Court's view, that is not an adequate justification to deny the motion. Paying a retainer that is accepted by a law firm, who then provides legal representation, establishes an attorney-client relationship.

The fact is that Stropheus does not deny that it received money towards a retainer agreement for work related to a painting from which, if it was sold, plaintiff was to potentially receive a portion of the proceeds. The Court recognizes that there is an unsigned engagement letter between Stropheus and Projjal (in his individual capacity). But neither plaintiff nor defendant is mentioned in this agreement.

Defendant was right to point to the email from Harry Hutchison where he tells Projjal to talk to "your lawyer" (NYSCEF Doc. No. 22) and the email where claims he has to get a lawyer to look at the agreement between plaintiff and defendant—the subject of this lawsuit (NYSCEF Doc. No. 25). However, the Court observes that Mr. Hutchison submitted a reply affidavit in

which he claims he was being sarcastic in this email. While a party may not ordinarily raise arguments for the first time in reply, here, defendant continually questioned why Mr. Hutchison did not include an affidavit in its opposition. Defendant cannot be surprised by this affidavit.

In any event, Mr. Hutchison's affidavit was not dispositive. Rather, the Court's decision is based primarily on the request for payment, the payment from plaintiff, and Stropheus' subsequent legal work.

Summary

The Court observes that this record is replete with many related corporate entities. There is the gallery itself (which is seemingly included in Mr. Hutchison's email signature), plaintiff, defendant, and Projjal in his individual capacity. The failure to separate these corporate identities in various records is understandable, as individuals in the artworld are likely not thinking about potential future legal consequences.

However, this fast and loose treatment makes it impossible for this Court to accept defendant's assertion that Stropheus was only its attorney and not plaintiff's. The engagement letter defendant points to is *only with Projjal* and not defendant. The totality of the circumstances here shows that Stropheus negotiated a deal with the purchaser and later crafted an agreement between plaintiff and defendant whereby *plaintiff* was to ultimately receive some amount of money based on the sale of artwork. And Stropheus sent an invoice (apparently to plaintiff) that plaintiff paid. That compels the Court to find that an attorney-client relationship existed between Stropheus and plaintiff.

And because the subject matter of this prior representation is the exact same issue in this case, the Court grants the motion. As noted above in *Cooke*, there is no requirement that there be confidences disclosed. "Where the lawyer, or the firm, has represented the former client in

matters related to the subject matter of the current proceeding, that alone would be sufficient to warrant disqualification irrespective of whether or not the lawyer in fact obtained any confidential information in the course of the prior employment. Disqualification of the attorney under such circumstances flows from the continuing sensitive nature of the attorney-client relationship and the ethical considerations which dictate that the first client is entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney” (*Cooke*, 126 AD2d at 456-57).

After all, Rule 1.9(a) of the Rules of Professional Conduct requires that “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 unless the former client gives informed consent, confirmed in writing.”


Accordingly, it is hereby

ORDERED that plaintiff’s motion to disqualify defendant’s counsel is granted.

Conference: January 10, 2024 at 11 a.m.

By January 3, 2024, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not

be required). If nothing is uploaded by January 3, 2024, the Court will adjourn the conference or may order a note of issue be filed.

<u>9/27/2023</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE