

**Tiny 1, Ltd. v Samfet Marble Inc.**

2025 NY Slip Op 34212(U)

October 31, 2025

Supreme Court, New York County

Docket Number: Index No. 651860/2020

Judge: Nancy M. Bannon

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

**PRESENT: HON. NANCY M. BANNON PART 61M**

*Justice*

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TINY 1, LTD., FKA PORT MORRIS TILE AND MARBLE  
CORP., VINCENT DELAZZERO,

Plaintiffs,

- v -

SAMFET MARBLE INC., PORT MORRIS TILE & MARBLE  
LP, PORT MORRIS TILE & MARBLE BOSTON LP, NYC  
MARBLE ACQUISITIONS LP, TOLA CAPITAL  
MANAGEMENT, LLC, GEORGES BERBERI, MICHAEL  
GIAMBRA, JAMES COYLE, MATT AUERBACH, MICHAEL  
BRESLIN, S.A.M. SAMFET GROUP, SALIM BERBARI

Defendants.

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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 019) 683, 684, 685, 686, 687, 688, 689, 698, 700, 701, 702, 703, 704, 705, 706, 707, 708

were read on this motion to/for DISQUALIFY COUNSEL.

In this breach of fiduciary duty action arising out of the sale of Port Morris Tile and Marble Corp. ("Old Port Morris"), the plaintiffs Tiny 1 Ltd., formerly known as Old Port Morris, and Vincent Delazzero move pursuant to Rule 3.7(a) and (b) of Rules of Professional Conduct (22 NYCRR 1200.01) to disqualify law firm Becker, Glynn, Muffly, Chassin & Hosinski LLP as defendants' trial counsel, as two of Becker Glynn's partners, Patrick O'Brien and Richard Chassin, are necessary fact witnesses on core issues of this action. The defendants oppose the motion. The motion is denied.

When considering a motion to disqualify counsel, a trial court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation." Abselet v Satra Realty, LLC, 85 AD3d 1406, 1407 (3<sup>rd</sup> Dept. 2011) (internal quotation marks and citations omitted). "Disqualification . . . during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a

party's right to representation by the attorney of its choice.” Ullmann-Schneider v Lacher & Lovell-Taylor PC, 110 AD3d 469, 469 (1<sup>st</sup> Dept. 2013) (quoting S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 443 [1987]). “The right to counsel is ‘a valued right [and] any restrictions must be carefully scrutinized.’” Ullmann-Schneider, supra (quoting S&S Hotel Ventures Ltd. Partnership, supra). The party moving for disqualification “carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be ‘so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification.’” Broadwhite Assocs. v Truong, 237 AD2d 162, 163 (1<sup>st</sup> Dept. 1997) (quoting Martinez v Suozzi, 186 AD2d 378, 379 [1<sup>st</sup> Dept. 1992]). “Absent such a showing, it would appear that [the movants] are simply seeking a strategic advantage by the disqualification of [the] plaintiff’s attorney of long standing, a result which would deny their adversary the valued right to representation by counsel of its choice.” Id. at 163, citing S&S Hotel Ventures Ltd. Partnership, supra at 446.

Rule 3.7(a) of Rules of Professional Conduct (22 NYCRR 1200.01), provides that a lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness. “In determining whether to disqualify an attorney on the ground that he or she will likely be a witness, the court is guided, but not bound by, the standards set forth in Rule 3.7... and whether to disqualify an attorney rests in the sound discretion of the court.” Harris v Sculco, 86 AD3d at 481 (1<sup>st</sup> Dept. 2011) (internal citations omitted). In determining whether the lawyer is a necessary witness, courts consider “significance of the matters, weight of the testimony, and availability of other evidence”. S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., supra at 446. Disqualification is often granted where no other witness can provide crucial testimony. See Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1<sup>st</sup> Dept. 2002).

The timing of a disqualification motion must also be considered. Such a motion can be denied where a delay in making it is “inordinate and inadequately explained” (Lewis v. Unigard Mut. Ins. Co., 83 AD2d 919, 920 [1<sup>st</sup> Dept. 1981]) as an inordinate delay may indicate that the motion has been made to gain a tactical advantage. See St. Barnabas Hosp. v. N.Y. City Health & Hosps. Corp., 7 AD3d 83 (1<sup>st</sup> Dept. 2004) (delay of more than a year); Prudential Sec., Inc. v Wyser-Pratte, 187 AD2d 306 (1<sup>st</sup> Dept. 1992) (motion made on eve of arbitration proceeding denied where “a strong inference may be drawn that [it] was made merely to secure a tactical advantage”); H.B.K. 45th Street Corp. v. Stern, 158 AD2d 3956 (1<sup>st</sup> Dept. 1990) (advocate witness disqualification denied where made 6 months after action commenced and subject of

attorney's testimony was known since inception). In that regard, the court notes that the plaintiffs filed this motion in September 2025, over two years after filing a Note of Issue in July 2023, and three months before trial which is scheduled to commence in December 2025. The plaintiffs state that they filed this motion now because it is "ripe" and moving earlier would have been premature. However, the plaintiffs provide no cogent explanation for not raising this issue sooner, as they would have been aware of any potential conflict as early as August 15, 2022, when, in their memorandum of law in support their motion for summary judgment (MOT SEQ 006), the plaintiffs stated that they intended to call Chassin as a witness for their case in chief.

Beyond the delay, the plaintiffs fail to establish their entitlement to disqualify Becker Glynn. Regarding O'Brien, who has not appeared in this action, the plaintiffs argue that he is a necessary witness for having authored an April 19, 2017, letter sent to Noreen Weiss, Old Port Morris' transactional attorney who has not appeared in this action. In this letter, O'Brien states that a \$14 million transfer of funds from Old Port Morris to defendant Samfet Marble was made in a manner "consistent with Port Morris' historical practices and on the basis of specific materials purchase orders, invoices, and job numbers". Indeed, a central issue in this action is whether the defendants improperly diverted funds from Old Port Morris. In particular, the second amended complaint alleges that defendants Georges Berberi, Michael Giambra, James Coyle, and Matt Auerbach diverted \$14 million from Old Port Morris' accounts and into defendant Samfet Marble's account, without the plaintiffs' knowledge. However, the plaintiffs fail to demonstrate why O'Brien is a singularly necessary witness who can testify as to claim in the April 19, 2017, letter that the \$14 million transfer was proper. Compare Cowen & Co. v Tecnoconsult Holdings, 234 AD2d 86 (1<sup>st</sup> Dept. 1996) (attorney's testimony not necessary as four other witnesses available to testify on same issue); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, supra (no witness other than attorney could provide explanation on how fees were owed under the subject agreement). The plaintiff does not dispute that there are other witnesses who may testify on this issue, such as defendants Berberi, Giambra, Coyle, and Auerbach. Indeed, the plaintiffs submit an email chain between O'Brien and these individual defendants from April 18-19, 2017, in which they discuss how to best draft the letter before sending it to Weiss. The plaintiffs could question those witnesses on those matters.

Regarding Chassin, who has appeared in this action as an attorney of record for defendants, the plaintiffs argue that he is a necessary witness because he drafted the Asset Purchase Agreement, by which the defendants acquired Old Port Morris. The plaintiffs allege

that Weiss and Chassin negotiated over whether the APA should include a representation and warranty that Old Port Morris' books and records were accurate. They further allege that Weiss, acting on behalf of plaintiffs, deleted this language from a proposed draft, and in the next draft sent by Chassin, Chassin did not include this provision. The plaintiffs argue that Chassin is needed to testify as to whether the defendants had assured him that the books and records of Old Port Morris were accurate, or if Chassin had verified the accuracy of the books and records. However, as with O'Brien, the plaintiffs fail to show that Chassin is a singularly necessary witness on this issue, as there are other witnesses available to testify as to Old Port Morris' books and records, including defendants Berberi, Auerbach, Coyle and Giambra. In the second amended complaint, the plaintiffs allege that these parties denied the plaintiffs access to the books and records and deliberately re-casted the books and records to conceal Old Port Morris' true value.

The plaintiffs also fail to establish disqualification under Rule 3.7(b), which states that "a lawyer may not act as an advocate before a tribunal if (a) another lawyer in that lawyer's firm is likely to be called as a witness on an issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client, or (b) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9". The plaintiffs submit an affirmation from Roy D. Simon, Jr., a professor of legal ethics at Hofstra University's Maurice A. Deane School of Law, who states that it is very likely that testimony from O'Brien and Chassin will prejudice the defendants, particularly if they are asked about the defendants' transfer of \$14 million from Old Port Morris and the defendants' history of record keeping. However, this view is unsupported and wholly speculative. As the defendants note, O'Brien and Chassin were never deposed during discovery. The plaintiffs fail to identify any proposed testimony that may be adverse to the defendants at trial. Grassini v Paravalos, 270 AD2d 52 (1<sup>st</sup> Dept 2000) Phoenix Assur. Co. of New York v C.A. Shea & Co., Inc., 237 AD2d 157 (1<sup>st</sup> Dept. 1997); Martinez v Suozzi, *supra*.

The plaintiffs' argument regarding Rule 1.7 fails as well. The plaintiffs argue that under Rule 1.7(a)(2), there is a significant risk that Becker Glynn's representation of the defendants will be compromised, as Becker Glynn attorneys will attempt to minimize exposure to malpractice liability and avoid any professional embarrassment of Chassin or O'Brien at trial. This too, is speculative and offered without any support.

The plaintiffs also argue that under Rule 1.9(a), Becker Glynn cannot represent the defendants as plaintiff Tiny 1 is a former client of Becker Glynn, and Tiny 1 never provided informed written consent. In that regard, the plaintiffs allege that during negotiations over the purchase of Old Port Morris, Chassin advised defendant Giambra, who was also serving as acting Chief Financial Officer of Old Port Morris at this time. In providing this advice, the plaintiffs argue that Giambra was acting in his capacity as CFO of Old Port Morris, now known as Tiny 1, and thus Tiny 1 is a former client of Becker Glynn. This argument is unavailing as the plaintiffs fail to identify any specific legal tasks performed by Chassin purportedly or Tiny 1.

Finally, the court notes that in support of their motion, the plaintiffs submit an affirmation from Roy D. Simon, Jr., a professor of legal ethics at Hofstra University's Maurice A. Deane School of Law, who states that in his expert opinion, the New York Rules of Professional Conduct prohibits Becker Glynn from representing the defendants in this action. However, an expert's opinion is not controlling. The court exercises its discretion to deny the motion for the reasons stated herein, as untimely and without substance. This record presents a strong inference that the motion was made merely to secure a tactical advantage which, if granted would deny the defendants their valued right to representation by counsel of their choosing.

The court has considered the plaintiff's remaining contentions and finds them unavailing.

Accordingly, upon the foregoing papers, it is

ORDERED that the motion to disqualify defendants' counsel is denied, and it is further,

ORDERED that counsel shall appear for a final pre-trial conference on November 13, 2025, at 2:30 p.m., as previously scheduled.

This constitutes the decision and order of the court.

  
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 NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

10/31/2025  
 DATE

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION  
 GRANTED  DENIED  GRANTED IN PART  OTHER