

Kang v Jun Hee Lee

2012 NY Slip Op 31396(U)

May 2, 2012

Supreme Court, Nassau County

Docket Number: 006611-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**WILLIAM KANG AND BIG PLUS PRINTING &
PACKAGING CORP. D/B/A BIG PLUS AMERICA,**

Plaintiffs,

-against-

JUN HEE LEE AND JOHN DOE,

Defendants.
-----x

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 006611-10
Motion Seq. No. 2
Submission Date: 3/15/12**

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition.....x**
- Reply Affirmation and Exhibits.....x**

This matter is before the court on the motion by Plaintiffs filed on April 29, 2011 and submitted on March 15, 2012. ¹ For the reasons set forth below, the Court grants the motion to disqualify the law firm of Weisberg & Weisberg from appearing as counsel for Defendant Jun Hee Lee in the above-captioned action, stays the instant action for a period of thirty (30) days and directs counsel for Plaintiffs, and substitute counsel for Defendant Lee, to appear before the Court for a Preliminary Conference on June 6, 2012 at 9:30 a.m. **Counsel for the parties shall not be required to appear before the Court on May 30, 2012 as previously directed.**

¹ This matter was adjourned numerous times by counsel for the parties who were engaged in extensive settlement discussions.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order disqualifying the law firm of Weisberg & Weisberg (“Weisberg Law Firm”) from appearing as counsel for Defendant Jun Hee Lee (“Lee”) in the above-captioned action (“Instant Action”).

Defendant Lee opposes the motion.

B. The Parties’ History

As noted in a prior Order of the Court dated December 17, 2010 (“Prior Order”), this matter was the subject of an earlier action (“Related Action”) titled *William Kang and Big Plus Printing & Packaging Corp., d/b/a Big Plus America v. Jun Hee Lee and John Doe*, Nassau County Index Number 022354-09. In a decision dated March 28, 2010 (“Related Decision”) (Ex. C to Yoo Aff. in Supp.), the Court (Warshawsky, J.), *inter alia*, granted the motion of Defendant Lee to dismiss the complaint for failure to obtain personal jurisdiction, without prejudice to renewal upon completion of proper service. Plaintiffs then filed the Instant Action, to which Lee has interposed a Verified Answer dated March 25, 2011 (*id.* at Ex. B).

In the Prior Order, the Court outlined in detail the allegations in the Complaint and the Court incorporates the Prior Order by reference as if set forth in full herein. As noted in the Prior Order, the Complaint contains five (5) causes of action. In the first cause of action, Plaintiffs allege that Lee violated his fiduciary duty to Plaintiff. In the second cause of action, Plaintiffs allege that Defendants committed fraud by falsely representing to Kang that they would provide capital funds to Big Plus. In the third cause of action, Plaintiffs allege that Defendants misappropriated and converted Big Plus’ property, including its customer list and Account information. In the fourth cause of action, Plaintiffs seek equitable relief including rescission of the Contract and an injunction preventing Defendants from transferring Big Plus funds from the Account. In the fifth cause of action, Plaintiffs seek punitive damages.²

In support of the instant motion, Plaintiffs’ counsel (“Plaintiffs’ Counsel”) affirms that, in the Related Action, the Weisberg Law Firm represented Plaintiff Big Plus America, as reflected by the Order with Notice of Entry provided (Ex. D to Yoo Aff. in Supp.). Plaintiffs’ Counsel submits that the Instant and Related Actions involve identical allegations.

In opposition, Lee’s counsel, a member of the Weisberg Law Firm (“Lee’s Counsel”)

² Plaintiffs have provided copies of the Complaint in the Instant Action and Amended Complaint in the Related Action (Exs. A and D to Yoo Aff. in Supp.), which contain similar allegations and causes of action.

submits that the instant motion is “nothing more than an attempt to distract this Court’s attention from the lack of merit of Plaintiff’s case” (Weisberg Aff. in Opp. at ¶ 2). Lee’s Counsel provides the following factual background regarding the parties’ dispute:

The company known as Big Plus CRE manufactures and sells fake nails internationally. Defendant Lee, the President of Big Plus CRE, wished to sell his products in the United States, and was introduced to Plaintiff William Kang (“Kang”) as a potential employee after Lee formed a new corporate entity for this purpose. Big Plus CRE and Lee funded the corporation, Big Plus Printing & Packaging Corp. (“Big Plus”) with millions of dollars. The sole business of Big Plus was the sale of fake nails, and its name bears no relation to the product it sells; it was named “Big Plus” due to its relationship with Big Plus CRE.

In October of 2009, Lee came to the United States to determine why Big Plus was not more profitable. When Lee reviewed Big Plus’ books and records, he discovered that Kang had issued stock to Lee and to himself, and that Kang had made himself an officer of Big Plus. When Lee confronted Kang, Kang admitted his wrongful acts and agreed to leave Big Plus immediately and return his stock to the company. Kang also executed an affidavit resigning from Big Plus. Immediately after Lee left the United States to return to Korea, Plaintiffs commenced this action.

In the Related Action, Lee retained the Weisberg Law Firm to represent Big Plus’ interest in the Related Action. Lee’s Counsel affirms that the Weisberg Law Firm’s participation in the Related Action was limited to a motion to intervene, and it was never granted access to the books and records of Big Plus which were in the exclusive control of Plaintiffs. No one from the Weisberg Law Firm has ever spoken to or met with Kang. In addition, the Court in the Related Decision denied the motion to intervene on behalf of Big Plus, holding *inter alia* as follows:

While Lee has not yet effectively been made a defendant, because of the failure of plaintiff to comply with the Hague Convention in making service, it is Lee who claims to be the owner of the assets of Big Plus America, which are placed at risk by the allegations of the plaintiff. Lee is therefore a proper party, whereas the corporation, which is the property in dispute, is not a necessary party to the controversy. Permitting a corporation whose ownership is at issue to appear presupposes that the party representing the corporation has authority to do so; and who has actual authority is the ultimate matter in controversy.

Lee’s Counsel argues that Plaintiffs have failed to articulate the party on whose behalf they are moving. Lee’s Counsel submits that if Plaintiffs’ Counsel is moving on behalf of Kang, then the Court must deny the motion because there is no relationship between the Weisberg Law

Firm and Kang. Lee's Counsel contends, further, that if Plaintiffs' Counsel is moving on behalf of Big Plus, then the Court must dismiss such a derivative action because it is facially defective. Lee's Counsel notes that Kang has alleged that Lee defrauded him out of his interest in the company by forcing him to sign over his shares of stock and argues that, as Kang is no longer a shareholder of Big Plus, he lacks standing to maintain a shareholder derivative action against Defendants.

In reply, Plaintiffs' Counsel disputes the assertion of Lee's Counsel that his involvement in the Related Action was limited to a motion to intervene. Plaintiffs Counsel provides a copy of a letter from the Weisberg Firm to a bank in Queens County dated March 3, 2010 (Ex. A to Yoo Reply Aff.) in which the Weisberg Firm advised the bank representative that the Weisberg Firm represented Big Plus and that the Court (Warshawsky, J.) had frozen all accounts of Big Plus pending further court order. In the letter, the Weisberg Firm also requested that the bank provide it with copies of the latest statements for the accounts of Big Plus. Plaintiffs' Counsel also provides a copy of a letter dated January 28, 2010 (*id.* at Ex. C) from Plaintiffs' Counsel to the Weisberg Firm reflecting that Plaintiffs' Counsel provided the Weisberg Firm with hundreds of pages of corporate records. Plaintiffs' Counsel submits that this correspondence refutes the assertion of Lee's Counsel that the Weisberg Firm was never provided with access to the corporation's books and records. Finally, Plaintiffs' Counsel disputes the claim of Lee's Counsel that he never met Kang. Plaintiffs' Counsel affirms that he and Lee's Counsel were present during a conference in the Related Action when Kang was prepared to testify before Justice Warshawsky.

Plaintiffs' Counsel also disputes the claim that the instant motion is a litigation tactic. Plaintiffs' Counsel affirms that he contacted the Weisberg Firm in the past to attempt to settle this matter but, after those negotiations proved unsuccessful, the instant application became necessary.

C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to disqualification of the Weisberg Firm by establishing that 1) there is an attorney-client relationship between the Weisberg Firm and Big Plus by virtue of its representation of Big Plus in the Related Action; 2) the matters involved in both representations are identical; and 3) the interests of the present client and the former client are materially adverse.

Lee opposes the motion, submitting that Plaintiffs have not made the required showing

that disqualification is warranted.

RULING OF THE COURT

A. Disqualification of Counsel

Although a party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right that should not be abridged, such right will not supersede a clear showing that disqualification is warranted. *Scopin v. Goolsby*, 88 A.D.3d 782, 784 (2d Dept. 2011), citing *Matter of Marvin Q.*, 45 A.D.3d 852, 853 (2d Dept. 2007), *app. disp.*, 10 N.Y.3d 927 (2008), quoting *Campolongo v. Campolongo*, 2 A.D.3d 476 (2d Dept. 2003). A party seeking disqualification of its adversary's lawyer must prove: 1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, 2) that the matters involved in both representations are substantially related, and 3) that the interests of the present client and former client are materially adverse. *Id.*, quoting *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131 (1996), *reh. den.*, 89 N.Y.2d 917 (1996).

B. Application of these Principles to the Instant Action

The Court grants the motion, and disqualifies the Weisberg Law Firm as counsel for Defendant Lee based on the Court's conclusion that 1) there was a prior attorney-client relationship between the moving party and opposing counsel by virtue of the Weisberg Law Firm's representation of Big Plus in the Related Action, 2) the matters involved in the Instant and Related Actions are substantially related, and 3) the interests of the present client, Lee, and former client, Big Plus, are materially adverse, particularly in light of Plaintiffs' allegation that Defendants misappropriated and converted Big Plus' property, including its customer list and Account information.

Accordingly, the Court grants the motion, stays the instant action for a period of thirty (30) days and directs counsel for Plaintiff, and substitute counsel for Defendant Lee, to appear before the Court for a Preliminary Conference on June 6, 2012 at 9:30 a.m. **Counsel for the parties shall not be required to appear before the Court on May 30, 2012 as previously directed.**

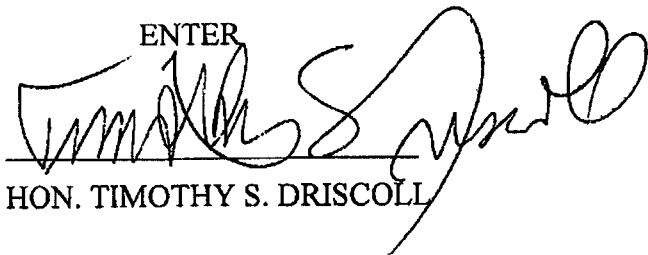
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiffs and counsel for Defendant Lee of the required appearance of counsel for Plaintiffs, and substitute counsel for Defendant Lee, at a Preliminary Conference before the Court on June 6, 2012 at 9:30 a.m.

DATED: Mineola, NY

May 2, 2012

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAY 09 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE