

Three Bros. Elec., Inc. v Oak Cr. Partners, LLC

2012 NY Slip Op 32435(U)

September 14, 2012

Supreme Court, Suffolk County

Docket Number: 12-10024

Judge: Thomas F. Whelan

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SHORT FORM ORDER

INDEX No. 12-10024
CAL. No. _____

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE August 15, 2012
ADJ. DATE August 17, 2012
Mot. Seq. # 001 - MD
CDISP: No

-----X	:	
THREE BROTHERS ELECTRIC, INC.,	:	Plaintiff's Attorney
	:	Certilman Balin Adler & Hyman, LLP
Plaintiff,	:	100 Motor Parkway, Ste 156
	:	Hauppauge, NY 11788
- against -	:	
	:	Defendant's Attorney
OAK CREEK PARTNERS, LLC,	:	Law Office of Raymond A. Giusto, PC
	:	715 S. Country Road
Defendant.	:	W. Bay Shore, NY 11706
-----X	:	

Upon the following papers numbered 1 to 25 read on this motion to disqualify counsel; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 23; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other Plaintiff's Memo of Law 25 - 25; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by the defendant to disqualify Certilman Balin Adler & Hyman, LLP as attorneys for the plaintiff is denied.

In this breach of contract action, the plaintiff, Three Brothers Electric, Inc. ("the plaintiff") seeks to recover payment for electrical services rendered to the defendant, Oak Creek Partners, LLC (hereinafter "the defendant") in the amount of \$66,768.55. The plaintiff was a subcontractor for the defendant and its managing member, Paul Aniboli, during the construction of condominiums called the Oak Creek Commons, located at 103 O'Keefe Court, Oakdale, in the Town of Islip, New York, between May, 2008 and August, 2009.

The record reveals that Aniboli also constructed other condominium projects during that period, named Broadway Knolls and Sayville Commons. All three projects subsequently became

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the subject of an investigation by The Long Island Housing Services, a non-profit organization which investigates complaints of discrimination, which generated a complaint to the United States Attorney General, who, in turn, commenced an action (hereafter “the USA action”),¹ on August 28, 2007, in U.S. District Court against Sayville Development Group, LLC, Stephen Ray Fellman, and Home Properties Sayville, LLC alleging that the defendants failed to design dwellings in compliance with the Fair Housing Act for persons with disabilities.

The record reveals that the law firm Certilman Balin Adler & Hyman, LLP (hereafter “Certilman Balin”) was retained to represent the Sayville Development Group and Stephen Fellman. On September 12, 2008, Certilman Balin moved by order to show cause to be relieved as counsel. The Court granted the motion.² Thereafter, Paul Aniboli, managing member of Sayville Development Group, executed a consent to change attorneys on November 7, 2008, and retained the Law Offices of Raymond A. Giusto, PC. The record further reveals that on November 12, 2009, USA filed a first amended complaint³ which added Oak Creek Partners LLC, among other defendants, alleging that the defendants failed to design and construct homes which were accessible to persons with disabilities, violating 42 U.S.C., § 3604(f)(3)(C).

The instant action was commenced by filing on May 1, 2012 by Glenn Gruder, Esq., a member of Certilman Balin, on behalf of the plaintiff.

The defendant now moves to disqualify Certilman Balin as plaintiff’s attorneys on the ground that one attorney of the firm, Douglas E. Rowe, Esq., previously represented Paul Aniboli, Sayville Development Group, Broadway Partners Development Group and Oak Creek Partners from 2007 through November 2008. The defendant’s counsel affirms that Certilman Balin represented Oak Creek Partners in negotiations regarding alleged violations related to Oak Creek Commons, which included the electrical work performed by the plaintiff at Oak Creek Commons. In addition, the defendant’s counsel affirms that Certilman Balin gained confidential information.

¹ The initial USA action was captioned *United States of America v Sayville Development Group, LLC a/k/a Sayville Development Corp., Stephen Ray Fellman, and Home Properties Sayville, LLC*, Case No.: CV 07-3622.

² By order dated October 6, 2008 (Lindsay, U.S. Magistrate Judge), the motion by Certilman Balin to withdraw as counsel to Sayville Development Group and Stephen Ray Fellman was granted, citing conflicts of interest.

³ The first amended complaint in the USA action is captioned *United States of America v Sayville Development Group, LLC a/k/a Sayville Development Corp., Stephen Ray Fellman, Paul J. Aniboli, Stepne Fellman, Architect, P.C., Broadway partners Development Group, LLC, Oak Creek Partners, LLC, Home Properties Sayville, LLC, and CLPF-Broadway Knolls, LP*.

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In support of the motion, the defendant submits, among other things, the pleadings in the instant matter, a copy of the USA complaint, correspondence from Giusto to Gruder, and the personal affidavit of Paul Aniboli. In his letter dated May 11, 2012, Giusto states that Gruder's firm allowed the government's expert to enter upon Oak Creek Commons for the purpose of performing an inspection of the work performed, and that Douglas Rowe was aware that Oak Creek Partners would be added to the initial lawsuit against Sayville Development Group while he was the attorney of record.

Paul Aniboli avers in his affidavit that he is the managing member of Oak Creek Partners, LLC. Aniboli states that from 2007 through the end of 2008, Certilman Balin represented Aniboli, as well as several entities of which he is a member, to wit, Sayville Development Group, Broadway Partners Development Group and Oak Creek Partners in the USA action. While initially only Sayville Development Group was a named defendant in the USA action, Aniboli states that he had substantial discussions with his attorney Douglas Rowe regarding the construction of Oak Creek Commons and the issues which are now before this court. Specifically, he states that he and Rowe discussed architectural plans, construction procedures, design, responsibility of contractors and sub-contractors, supervision of the project, and compliance with local, state and federal statutes. In late 2008, with the advice of Certilman Balin, Aniboli permitted the inspection of Oak Creek Commons by the government which then resulted in the addition of Oak Creek Partners as a party to the USA action.

In opposition, the plaintiff's counsel contends that Certilman Balin never represented Oak Creek Partners, LLP, inasmuch as it substituted out in 2008 as counsel prior to the service of the first amended complaint by USA in 2009. The plaintiff submits, among other things, a Civil Cover Sheet from the commencement of the USA action which demonstrates that Oak Creek Partners, LLP was not a party, a copy of the consent to change attorney dated November 7, 2008, a copy of the order to show cause dated September 12, 2008 seeking to be relieved as counsel to Sayville Development Group and Fellman in the USA action, the order granting, in part, the motion to withdraw, the personal affidavit of Douglas Rowe, and the personal affidavit of Mark Kassay.

Douglas Rowe avers in his affidavit that he is a member of Certilman Balin. He states that Certilman Balin's representation was limited to Sayville Development and Fellman in the USA action. Rowe states that at the time of the commencement of the federal action in 2007, Oak Creek Partners LLC was not a defendant, and in fact, did not become a defendant until USA amended its complaint in 2009. By then, Certilman Balin had moved by order to show cause on September 12, 2008 to be relieved as counsel and had been substituted out as counsel, on November 7, 2008. During the litigation, however, USA requested copies of building plans drafted by Fellman, the architect, for other projects involving Aniboli. Although he provided the plans for Oak Creek Commons and other projects designed by Fellman to USA, the plans were already on file in the Building Department of the Town of Islip, and were accessible to any member of the public. In addition, Rowe states that Aniboli did not reveal any secrets or confidential information to him

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regarding Sayville Development, Oak Creek Partners or any other aspect of the USA litigation. Rowe also denies knowledge of an inspection of Oak Creek Commons while he represented Sayville Development Partners and Fellman, inasmuch as the inspection occurred on October 27, 2008, after Certilman Balin's motion to withdraw was granted.

Mark Kassay avers in his personal affidavit that he is the president of the plaintiff. He states that the plaintiff was hired by Oak Creek Partners to perform all of the electrical work at Oak Creek Commons' residential development project. The plaintiff had no involvement in the design or layout of the interior plans for the units at Oak Creek Commons. All of the plaintiff's work was inspected and approved by an Electrical Inspection Agency and Electrical Underwriter Certificates have been issued for all the work performed. In addition, certificates of occupancy have been issued for all of the completed units, and there has been no complaint that the plaintiff's work was faulty.

"Although [a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged, 'such right will not supersede a clear showing that disqualification is warranted'" (*In re Marvin Q.*, 45 AD3d 852, 853, 846 NYS2d 356 [2d Dept 2007], quoting *Campolongo v Campolongo*, 2 AD3d 476, 476, 768 NYS2d 498 [2d Dept 2003]; see *Greene v Greene*, 47 NY2d 447, 453, 418 NYS2d 379 [1979]; *Matter of Astor Rhinebeck Assoc., LLC v Town of Rhinebeck*, 85 AD3d 1160, 1161, 925 NYS2d 896 [2d Dept 2011]; *Horn v Mun. Info. Servs.*, 282 AD2d 712, 724 NYS2d 320 [2d Dept 2001]). "The 'disqualification of an attorney is a matter which rests within the sound discretion of the court and will not be overturned absent a showing of abuse'" (*Wells Fargo Bank, N.A., as Trustee, Respondent v Caro*, 82 AD3d 880, 920 NYS2d 90 [2d Dept 2011], quoting *Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 277, 476 NYS2d 151 [2d Dept 1984]; see *A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 736, 736, 823 NYS2d 433 [2d Dept 2006]; *Calandriello v Calandriello*, 32 AD3d 450, 451, 819 NYS2d 569 [2d Dept 2006]).

"[A] party seeking disqualification of its adversary's lawyer or a law firm on the ground of prior representation 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" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131, 651 NYS2d 954 [1996]; see Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.9[a]; *Falk v Chittenden*, 11 NY3d 73, 78, 862 NYS2d 839 [2008]; *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636, 684 NYS2d 459 [1998]). The moving party must satisfy all three criteria in order to give rise to a presumption of disqualification of opposing counsel (see *Tekni-Plex, Inc. v Meyner & Landis*, *supra* at 131).

Here, the defendant failed to establish the existence of a prior attorney-client relationship with Certilman Balin, and, more importantly, failed to dispute Rowe's affidavit that he was retained solely to represent Sayville Development Group and Fellman in the USA litigation. Moreover, Oak

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Creek Partners has not alleged or included a retainer agreement or letter of engagement between it and Rowe or Certilman Balin, nor has it attached any bills or evidence of payment, or direct attorney-client communication between it and Rowe or Certilman Balin. In any event, there was no showing by Aniboli, the defendant's managing member, which identified any specific confidential information imparted to Douglas Rowe. An attorney may divulge generally known information about a former client (*see Jamaica Pub. Serv. Co. v AIU Ins. Co.*, *supra* at 637). The defendant has failed to identify any confidential information that it may have divulged to the plaintiff's attorney that is not readily available in public materials and that is not generally known (*Id.* at 637-638; *see Volo Logistics LLC v Varig Logistica S.A.*, 51 AD3d 554, 555, 859 NYS2d 127 [1st Dept 2008]). In the case at bar, Aniboli has failed to provide any evidence, except for his self-serving affidavit (*see Ryfun v 406 W. 46th St. Corp.*, 288 AD2d 10, 732 NYS2d 216 [1st Dept 2001]), which consists of conclusory and unsubstantiated allegations that are insufficient to establish an attorney-client relationship between Certilman Balin and the defendant.

Accordingly, the motion to disqualify Certilman Balin Adler & Hyman, LLP is denied.

Dated: _____

9/14/12



THOMAS F. WHELAN, J.S.C.