

Lorber v Holzer

2015 NY Slip Op 31542(U)

August 12, 2015

Supreme Court, New York County

Docket Number: 653665/2014

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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HOWARD LORBER, OXBRIDGE CAPITAL
MANAGEMENT, LLC,
OXBRIDGE CAPITAL FUND I, LLC,
OXBRIDGE CAPITAL FUND II, LLC,
OXBRIDGE CAPITAL FUND III, LLC,
OXBRIDGE CAPITAL FUND IV, LLC,
OXBRIDGE CAPITAL FUND V, LLC,
OXBRIDGE CAPITAL FUND VI, LLC,
OXBRIDGE CAPITAL FUND VII, LLC,

Plaintiff,

INTERIM ORDER

- against -

Index No. 653665/2014
Motion Seq. No. 001

CHARLES "RUSTY" HOLZER

Defendant.

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HON. SALIANN SCARPULLA, J.:

In this action, defendant and counterclaim plaintiff Charles "Rusty" Holzer ("Holzer" or "defendant") moves to disqualify Stanley Arkin ("Arkin") and his firm, Arkin Solbakken LLP ("Arkin Solbakken"), from representing plaintiffs.

Plaintiffs Howard Lorber ("Lorber"), Oxbridge Capital Management, LLC ("Oxbridge"), Oxbridge Capital Fund I, LLC, Oxbridge Capital Fund II, LLC, Oxbridge Capital Fund III, LLC, Oxbridge Capital Fund IV, LLC, Oxbridge Capital Fund V, LLC, Oxbridge Capital Fund VI, LLC, and Oxbridge Capital Fund VII, LLC (with Oxbridge Capital Funds I-VI, "Oxbridge Funds," and collectively with Lorber and Oxbridge, "plaintiffs") commenced this action on November 26, 2014, bringing causes of action for

breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, and unjust enrichment against Holzer.

The following facts are taken from the complaint. Holzer is a managing member of Oxbridge, and he recommended that the plaintiffs hire Lance Valdez (“Valdez”) as an investment advisor. Plaintiffs claim that “Holzer then conspired with Valdez to steer millions of dollars of the Oxbridge Funds into Indian Creek Investors, Ltd. (‘Indian Creek’), a relatively new hedge fund in which Holzer held a 15% interest.” Holzer did not disclose to Oxbridge’s other managing members that Oxbridge Funds invested in Indian Creek and that Holzer had an interest in Indian Creek.

In his answer, Holzer asserted counterclaims for breach of fiduciary duty, fraud, breach of contract, unjust enrichment, an accounting, a constructive trust, money had and received, and a counterclaim under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) against Lorber. Holzer alleges that “Oxbridge and the Oxbridge Funds were formed by Lorber, Lorber’s close associate and confidant, Robert Eide (‘Eide’), and Holzer as an investment vehicle for friends and family members of Lorber and Holzer.” Lorber and Eide are business partners, and were majority-interest owners of broker-dealer Aegis Capital Corp. (“Aegis”). Upon information and belief, Holzer alleges “Lorber and Eide conspired to use the Diverted Funds to help Aegis meet its net capital requirement and repay Aegis’s customers with the purpose of defrauding Oxbridge, the Oxbridge Funds, its investors and Holzer.”

Holzer additionally alleges “[o]n information and belief, in or around 2008, Lorber and Eide also conspired to prevent Holzer from having any involvement in Oxbridge,

notwithstanding that he had a one-third membership interest in the company.”

Additionally, Holzer alleges that although Lorber and Eide received distributions from Oxbridge from January to August 2008, Holzer has not received any distributions since July 2007. Specifically, he alleges as follows:

When Lorber and Eide exercised their control over Oxbridge in 2008 to halt distributions to Holzer, Lorber told Holzer that they were holding Holzer’s distributions in an escrow account held by Oxbridge’s counsel, Stanley Arkin, until the completion of an investigation being conducted by Mr. Arkin’s firm at the time, Arkin Kaplan Rice LLP [“Indian Creek Investigation”]. . . .

Although Holzer asked a number of times about “the outcome of Arkin’s investigation and when his share of the distributions would be released,” he received no response from Lorber or Eide. Holzer also alleges that he was without access to the books and records of Oxbridge.

After filing his answer with counter-claims, Holzer filed this motion to disqualify Arkin and Arkin Solbakken on three grounds. First, Holzer argues Arkin must be disqualified because Holzer was a client of Arkin’s previous firm, Arkin Kaplan Rice LLP (“Arkin Kaplan”), and “this action and Arkin Rice’s representations of Holzer are adverse and substantially related.” Arkin Solbakken, Holzer further argues, may not represent plaintiffs because Arkin’s conflict is imputed to his firm.

Second, Holzer argues that even if Arkin and Arkin Solbakken are not disqualified from serving as plaintiffs’ counsel in this action, they may not represent Oxbridge and Lorber because there is a conflict of interest between the two parties preventing simultaneous representation. Third, Holzer maintains that Arkin and Arkin Solbakken

should be disqualified because “Stanley Arkin will provide necessary testimony concerning two critical issues in this action.”

In opposition, plaintiffs first argue that Holzer does not have standing to move to disqualify Arkin or Arkin Solbakken because Arkin Kaplan did not represent Holzer. Second, plaintiffs argue that even if Holzer was represented by Arkin Kaplan, Holzer does not identify confidential information Arkin or any of his associated firms gained during the previous representation “that might be subject to abuse as a result of Arkin’s participation in this case.” Third, plaintiffs maintain that there is no conflict between Oxbridge and Lorber. Finally, plaintiffs argue that Arkin should not be disqualified because he is not a necessary witness.

Discussion

[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.

Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131 (1996).¹ A movant must satisfy these inquires before “an irrebuttable presumption of disqualification” applies.

Tekni-Plex, 89 N.Y.2d at 132.

¹ See New York Rules of Professional Conduct (“NYRPC”) 1.9(b):

Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

“The rule is intended to serve two purposes, namely, the protection of client confidences and the avoidance of the appearance of impropriety.” *Talvy v. Am. Red Cross in Greater N.Y.*, 205 A.D.2d 143, 148 (1st Dep’t 1994), *aff’d*, 87 N.Y.2d 826 (1995). If “there is substantial doubt about the propriety of [a] law firm continuing as . . . counsel, . . . such doubts are to be resolved in favor of disqualification.” *Anonymous v. Anonymous*, 262 A.D.2d 216, 216 (1st Dep’t 1999).

However, “motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client’s attorney is ignorant of any confidences of the prior client.” *Solow v. Grace & Co.*, 83 N.Y.2d 303, 310 (1994). Moreover, “[d]isqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party’s right to representation by the attorney of its choice.” *S & S Hotel Ventures, Ltd. P’ship v. 777 S. H. Corp.*, 69 N.Y.2d 437, 443 (1987). “[I]t is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation. The Code instead provides ‘guidance for the courts in determining whether a case would be tainted by the participation of an attorney or a firm.’” *Id.* at 444–45 (citation omitted).²

² NYRPC supersedes the Code of Professional Responsibility.

Attorney-Client Relationship

To determine whether an attorney-client relationship exists, a court must consider the parties' actions. '[A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task.' While the existence of the relationship is not dependent upon the payment of a fee or explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions.

Pellegrino v. Oppenheimer & Co., Inc., 49 A.D.3d 94, 99 (1st Dep't 2008) (internal citations omitted). Moreover, "[a] lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual." *Campbell v. McKeon*, 75 A.D.3d 479, 480-81 (1st Dep't 2010). Here, Holzer claims that Arkin Rice represented him in his individual capacity "on two prior occasions in substantially related, if not identical, matters," and he stated in an affidavit that at different times Alan Arkin, Michael McLaughlin, and Michelle Rice of Arkin Rice represented to him that their communications would be privileged and that Arkin Rice was representing Oxbridge and its individual members. Holzer additionally claims that he had discussions with Arkin and Rice concerning legal strategy.

Plaintiffs argue that Arkin Kaplan never represented Holzer in his individual capacity and only represented Oxbridge. They support their argument, in part, with a "File Opening Memoranda," listing only "Oxbridge Capital Management, LLC" as the client and listing "Rusty Holzer" and "Indian Creek Investors, Ltd." as potential adverse parties; an email in which Holzer allegedly stated "I understand you represent Oxbridge;" and an email from Holzer to Rice stating that he "w[ould] be bringing personal counsel to [a] meeting" with Rice.

Based on the parties' competing submissions, I cannot determine the issue of whether Arkin Kaplan ever represented Holzer in his individual capacity. Therefore, I order an evidentiary hearing on whether Arkin Kaplan ever represented Holzer in his individual capacity.

Substantially Related and Materially Adverse

Holzer alleges that the attorneys from Arkin Kaplan agreed to represent him in his personal capacity in two matters that "are substantially related" to the current dispute between plaintiffs and Holzer. *See Tekni-Plex*, 89 N.Y.2d at 131. First, in 2008, Holzer claims to have provided information to Arkin Kaplan attorneys after they stated they were representing Holzer individually "to assist with the Indian Creek Investigation and help Oxbridge mount a defense against Valdin's [Valdez's company] claims for unpaid fees." Second, Holzer alleges Arkin Kaplan personally represented him in a dispute brought by an investor, Stewart Rahr ("Rahr"), whose "allegations included claims that Oxbridge failed to supervise Valdin's selection of investments. As part of those claims, Rahr referenced Oxbridge's dispute with Valdin concerning the Funds' investment in Indian Creek." (Internal citation omitted) These disputes and the current litigation all concern the circumstances surrounding Oxbridge's investment in Indian Creek, and thus "are substantially related." *See id.* Moreover, the interests of plaintiffs and Holzer "are materially adverse." *See id.*

Imputation

If I find that Arkin Kaplan represented Holzer individually, Arkin and Arkin Solbakken will be disqualified from representing plaintiffs because plaintiffs have not

shown “that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation.” *Kassis v. Teacher’s Ins. & Annuity Assn.*, 93 N.Y.2d 611, 617 (1999); *see* NYRPC 1.10(c). Plaintiffs argue that even if Arkin Kaplan represented Holzer disqualification would be inappropriate because Holzer has not identified confidential information he provided to Arkin or his associated firm. However, Holzer does identify such information, e.g., conversations with Arkin and Rice in order “to formulate a strategy for defending against Rahr’s claims, including potential claims against me, Lorber and Eide in our individual capacities.” Holzer states that during these conversations he “shared confidences with Stanley Arkin and Ms. Rice regarding the selection and appointment of Valdin, as well as the investment in Indian Creek.”

In accordance with the foregoing, if after the hearing I find that Arkin Kaplan represented Holzer individually, based on the papers submitted, Holzer has shown that the representations are substantially related, the interests of the plaintiffs and defendant are materially adverse, and that Arkin’s conflict will be imputed to Arkin Solbakken.


I will address the other arguments raised in the parties’ motion papers, if necessary, following the evidentiary hearing.

It is hereby

ORDERED that the parties shall appear before the Court, in Room 208, 60 Centre Street, on September 21, 2015 at 9:30 a.m. for an evidentiary hearing on the issue of whether Arkin Rice represented Charles "Rusty" Holzer in his individual capacity, consistent with this decision.

This constitutes the decision and order of the Court.

DATE: 8/17/15


SCARPULLA, SALIANN, JSC