

Riederman Assoc. LLC v Justin
2017 NY Slip Op 30812(U)
April 20, 2017
Supreme Court, New York County
Docket Number: 650022/2017
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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RIEDERMAN ASSOCIATES LLC,

Plaintiff,

Index No. 650022/2017

-against-

DECISION & ORDER

ANDREW JUSTIN, THE JUSTIN HOLDING
COMPANY LLC, AJ PROPERTY MANAGEMENT
NYC LLC, JR BUILDING ASSOCIATES, and
READYWORK LLC,

Defendants.

-----x
SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001 and 002 are consolidated for disposition.

Defendants' current attorneys, Diamond McCarthy LLC, move, by separate motions, to admit Richard G. Jensen and Peter K. Doely *pro hac vice* to represent defendants in this action. Motion Sequences 001 & 002, respectively. Jensen and Doely are attorneys with the Minnesota law firm of Fabyanske, Westra, Hart & Thomson, PA (Firm). Plaintiff Riederman Associates LLC (Riederman) opposes both motions on the ground that the Firm must be disqualified from representing defendants, because it represented defendant JR Building Associates (Partnership), a New York partnership, of which Riederman is a partner.

The facts in this paragraph are taken from the complaint. The Partnership is a nominal defendant. Complaint, ¶5. Since its inception, the Partnership has owned a 15-story mixed-use building located at 231 West 29th Street, New York, NY (Building). *Id.*, ¶8. The present partners of the Partnership and their percentage ownerships interest are: Riederman 50%; Andrew Justin (Justin) 25%; and the Justin Holding Company, LLC (Justin Holding) 25%. *Id.*, ¶13. Justin is the managing partner. *Id.*, ¶14. Beginning March 1, 2014, AJ Property

Management NYC LLC (AJ) began managing the Building. *Id.*, ¶15. AJ is wholly owned by Justin. *Id.*, ¶17.

The complaint seeks dissolution of the Partnership, an accounting, access to Partnership books and records that AJ and Justin allegedly refused to provide, and damages for breach of fiduciary duty and conversion. Riederman claims that it did not receive its correct proportion of a distribution of mortgage proceeds from a refinancing in 2014; that Justin and AJ are not paying rent for two suites in the Building that they occupy; that Justin and AJ formed defendant Readywork LLC (Readywork) to use one of the suites for short-term rentals without sharing the monies with the Partnership; and that Justin permitted his daughter to occupy the Building's penthouse rent-free. Complaint, ¶¶21-21 & 35-39.

The Firm opposes disqualification on the grounds that: 1) it represented the Partnership only, not Riederman in its status as a partner; and 2) its representation, which began in April 2014, was not substantially related to the transactions alleged in the complaint. Jeffrey Jones, a shareholder in the Firm, who had primary responsibility for representing the Partnership, avers that the Firm's prior representation was limited to drafting and negotiating leases and the 2014 mortgage refinancing. 3/9/17 Affidavit of Jeffery Jones, ¶¶ 4, 5 & 6. Jones denies involvement with the distribution of the mortgage proceeds. He does not address whether the Firm drafted or negotiated leases for the short-term rentals by Readywork. Nor does he dispute that his Firm currently represents the Partnership. 2/24/17 Laurence M. Sklaw Affirmation, ¶¶ 10 & 13.

Discussion

A movant seeking disqualification of an opponent's counsel bears a heavy burden. A party has a right to be represented by counsel of its choice, and any restrictions on that right "must be carefully scrutinized". This right is to be balanced 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. Courts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation. The decision of whether to grant a motion to disqualify rests in the discretion of the motion court.

Mayers v Stone Castle Partners, LLC, 126 AD3d 1, 5-6 (1st Dept 2015) [internal citations omitted].

Rule 1.7 of the Rules of Professional Conduct, provides:

Conflict of interest: ***current clients***.

(a) Except as provided in paragraph (b), ***a lawyer shall not represent a client if*** a reasonable lawyer would conclude that either:

(1) ***the representation will involve the lawyer in representing differing interests***; or

(2) there is a significant risk that the lawyer's professional judgement on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) ***Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:***

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) ***the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation*** or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. [emphasis added]

22 NYCRR 1200.7.

Rule 1.13 provides, in pertinent part:

Organization as client

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the

lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization ***is engaged in action or intends to act or refuses to act in a matter related to the representation that*** (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and ***(ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization....***

(d) ***A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.*** If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. [emphasis added]

22 NYCRR 1200.13; *see also, Campbell v McKeon*, 75 AD3d 479 (1st Dept 2010) (counsel to entity could not represent entity and majority member with adverse interest to entity). Any doubt as to the sufficiency of a conflict should be resolved in favor of disqualification. *Id.*

Here, the Firm's representation of defendants and the Partnership would involve the representation of conflicting interests in this litigation, in violation of Rule 1.7(b)(3). The complaint alleges that the defendants other than the Partnership have engaged in conduct that has harmed the organization. If Riederman prevails on its claims for conversion and breach of fiduciary duty relating to the improper use and rental of suites in the Building without paying compensation to the Partnership, it will recover a judgment from the defendants that have been found to be liable. While the Partnership is a nominal defendant, it has an interest in recovering any monies and business opportunities alleged to have been diverted by defendants.

Furthermore, the accounting claim will require the managing partner, Justin, to account. The Firm may not represent both the organization and its partners, pursuant to Rule 1.13(d), because it is subject to the prohibition of 1.7(b)(3).

Moreover, there is at least an inference that the Firm's representation of the Partnership is substantially related to the claims regarding the diversion of the Readywork short-term rentals. The purpose of the substantial relationship test is to protect client confidences. *Solow v W. R. Grace & Co.*, 83 NY2d 303, 309 (1994). The rule is designed to free the former client from apprehension that confidences disclosed to his attorney will not be subsequently used against him in later litigation. *Id.* Here, as the Firm does not address whether the leases it drafted and negotiated included the Readywork rentals, the court must resolve the doubt in favor of disqualification. *Campbell v McKeon, supra*. The court must assume for purposes of the disqualification motion that there is a substantial relationship between Firm's leasing work for the Partnership and the claims in this litigation seeking to recover the revenue from Readywork's short-term rentals. The Partnership, the former client, is entitled to be free from apprehension that information concerning the Readywork leases will be used against it.

Finally, it does not appear that the request for disqualification was made for tactical purposes, such as to delay the case and deprive defendants of quality representation. The action is in its infancy. A preliminary conference has not been held. Defendants are represented by the New York office of Diamond McCarthy LLP, who filed an answer. These motions are the only motions that have been filed. Accordingly, it is

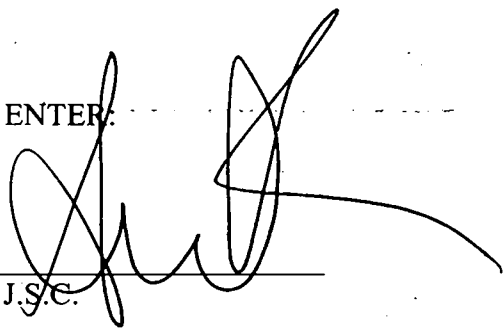
ORDERED that the motions [Sequences 001 and 002] by defendants to admit Richard G. Jensen and Peter K. Doely *pro hac vice* to represent them in this action are denied; and it is further

ORDERED that Fabyanske, Westra, Hart & Thomson, PA, is disqualified from representing defendants in this action; and it is further

ORDERED that by May 9, 2017, the parties shall efile a joint letter, as required by the Conferences Rule in the court's Individual Practices,¹ and appear for a preliminary conference on May 11, 2017, at 11 a.m., in Part 54, Room 228, at the courthouse located at 60 Centre Street, New York, NY.

Dated: April 20, 2017

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

¹ The court's Individual Practices can be found at the following link:
http://www.nycourts.gov/courts/comdiv/ny/PDFs/Part_54_Practices.pdf