Atlantic Yards Plaza LLC v Talde
2018 NY Slip Op 30179(U)
February 1, 2018
Supreme Court, Kings County
Docket Number: 517605/2017
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of February, 2018.

PRESENT:

HON. SYLVIA G. ASH,
Justice.
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ATLANTIC YARDS PLAZA LLC,

Plaintiff,

- against -

DALE TALDE, DAVID MASSONI, JOHN BUSH, D.J.D. RESTAURANT ASSOCIATES LLC a/k/a THREE KINGS RESTAURANT GROUP,

Defendants.
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DECISION AND ORDER

Index # 517605/2017

Mot. Seq. 1 - 3

The following papers numbered 1 to 20 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 6
Opposing Affidavits (Affirmations)	7 - 19
Reply Affidavits (Affirmations)	20

Upon the foregoing papers, Defendants, DALE TALDE ("Talde"), DAVID MASSONI ("Massoni"), JOHN BUSH ("Bush" and collectively with Talde and Massoni, "Individual Defendants"), and D.J.D. RESTAURANT ASSOCIATES LLC (hereinafter "DJD" or collectively with Individual Defendants, "Defendants") move to dismiss the complaint in its entirety or, in the alternative, to compel mediation/arbitration of Plaintiff's claims. Defendants also seek sanctions against Plaintiff and its prior counsel pursuant to 22 NYCRR §130 (motion sequence 1). Plaintiff, ATLANTIC YARDS PLAZA LLC ("Plaintiff" or "Atlantic"), moves by way of order to show cause for an order disqualifying Meister Seelig & Fein LLP ("MSF") from representing Defendants in this matter and permanently enjoining MSF from revealing Plaintiff's confidences (motion sequence 2). Plaintiff also cross-moves for leave to amend its complaint to add five defendants and two causes of action (motion sequence 3).

In or around October 2016, Plaintiff entered into a Restaurant Management Agreement ("Agreement") with DJD, a restaurant management company whose members include the Individual Defendants. Plaintiff is the owner of a restaurant known as Atlantic Social located on 673 Atlantic Avenue in Brooklyn, New York, which is the restaurant that is the subject of the Agreement. Before Atlantic Social, Plaintiff's members, Giorgios and Steven Menexas, operated a Tony Roma's franchise at the premises.

According to the proposed amended complaint, in or around March 2016, Giorgios and Steven Menexas "sought to enter into a deal with a restaurant management company to, among other things, handle the change of the restaurant concept" and "to assume the operations and management of the restaurant" (Verified Amended Complaint, Paragraph 28). Further, that Giorgios and Steven Menexas entered into an attorney-client relationship with Stuart Rich ("Rich"), a MSF partner at the time, "to consult with them regarding entering into a restaurant management agreement with a restaurant management company, including, to help them understand the benefits, risk and workings of a restaurant management agreement" (*Id.* at Paragraph 30). By email dated April 7, 2016, Rich introduced Giorgios Menexas to Massoni about the possibility of Massoni and his partners, Talde and Bush, managing the Atlantic Avenue location for Plaintiff. This introduction ultimately culminated in the Agreement and, thereafter, the opening of Atlantic Social on February 18, 2017.

Approximately seven months later, on September 12, 2017, Plaintiff commenced this action against Defendants alleging, among other things, fraudulent concealment and inducement. Plaintiff alleges that Defendants "engaged in a number of fraudulent schemes whereby they simply used [Atlantic Social] as a vehicle to support their other business ventures" including directing their employees to falsify their time records by having them clock in at Atlantic Social and then work at their other restaurants, orchestrating the departures of many Atlantic Social employees to work at Defendants' other restaurants, and taking an ice freezer bought for Atlantic Social to use at Defendants' other restaurants (Verified Amended Complaint, Paragraphs 60-74).

Before interposing an answer, on October 3, 2017, Defendants filed a motion seeking dismissal of Plaintiff's complaint against the Individual Defendants for failure to plead fraud with specificity and dismissal or a stay of Plaintiff's causes of action against DJD pending compliance with the ADR provision contained in the Agreement. On October 17, 2017, Plaintiff filed an order to show cause seeking to disqualify MSF as counsel for Defendants. On December 8, 2017, Plaintiff cross-moved to amend its complaint. The Court first addresses Plaintiff's motion to disqualify.

Plaintiff's Motion to Disqualify MSF as Counsel

Plaintiff argues that MSF must be disqualified as counsel for Defendants because MSF represented Plaintiff in a matter that is related to the present litigation and in which they are now directly adverse. Defendants dispute that Plaintiff was ever a client of MSF and further disputes that any prior representation is substantially related to the instant litigation.

It is undisputed that on or around April 5, 2016, SGM Foods LLC ("SGM") and Steven Menexas signed an engagement letter with Rich, who was a MSF partner at the time. The engagement letter reflects that MSF was retained to represent SGM in defending an adversary proceeding filed by a bankruptcy trustee alleging improper interference with the trustee's operation and auction of R&J Pizza Corp. In addition, though not reflected in the aforementioned engagement letter, it is undisputed that MSF counseled SGM on the early termination of the Tony Roma's franchise agreement.

It is Plaintiff's position that MSF's engagement as counsel for the Tony Roma's franchise agreement termination encompasses legal work related to Plaintiff insofar as MSF helped Plaintiff understand the "benefits, risk and workings of a restaurant management agreement" (Verified Amended Complaint, Paragraph 30). That in the course of this attorney-client relationship, Plaintiff provided "Rich and other MSF attorneys including Jeffrey Schreiber, Judd Cohen and others," with "sensitive confidential information" such as Plaintiff's "strength and weaknesses from both a knowledge, organizational, operational and financial standpoint," its "vulnerabilities," and "concerns with [the Atlantic Avenue location's] lease, financial obligations including loans and loan terms, obstacles, limitations and concerns related to, inter alia, the various aspects of a potential restaurant management agreement" (*Id.* at Paragraph 31). Plaintiff argues that the foregoing demonstrates a substantial relationship between MSF's previous representation of SGM and its current representation of Defendants relating to the Agreement. Plaintiff alternatively argues that, if the Court finds that this litigation is not substantially related to MSF's prior representation of SGM and Steven Menexas, disqualification of MSF would still be warranted because MSF was entrusted with Plaintiff's confidential and sensitive information by virtue of its previous representation.

Plaintiff additionally contends that MSF must be disqualified as Defendants' counsel pursuant to the witness-advocate rule. Plaintiff argues that, as the litigation proceeds, discovery will focus on what MSF and Rich knew, the introduction to Massoni while Rich was still a partner at MSF and how attorney-client protected information may have been used to accomplish the fraud. That therefore, MSF and Rich are principal players in the facts comprising

Defendants' fraudulent scheme and will serve as indispensable fact witnesses in this matter regarding the Agreement and the day-to-day involvement in the relationship between Plaintiff and Defendants.

It is undisputed that, after introducing Giorgios to Massoni via email dated April 7, 2016, Rich departed MSF "to move to the biz side to consult on Real Estate and F&B/Hospitality ventures in a non-legal capacity," as indicated to Giorgios by an email from Rich on April 19, 2016. According to Plaintiff, MSF continued to counsel Plaintiff until the end of May 2016.

In opposition to Plaintiff's motion, Defendants contend that neither Plaintiff nor DJD retained MSF to negotiate the Agreement. Rather, Rich, who was by then a former MSF attorney, represented DJD and the law firm of Helbraun & Levey LLP represented Plaintiff in negotiating the Agreement. Further, Defendants contend that Plaintiff's claim that Rich received confidential information during the course of his representation of SGM and Steven Menexas is belied by the fact that Plaintiff never objected to Rich's involvement in negotiating the Agreement on behalf of DJD despite Rich having represented SGM previously.

Defendants also argue that MSF's prior representation is unrelated to the matter at hand considering that the parties did not even begin to negotiate the Agreement until August 2016, several months after MSF's representation of SGM had terminated. Also, that MSF's representation in the Tony Roma's matter pertained to investigating early termination of the franchise agreement while reducing exposure to damages and minimizing the effects of any restrictive covenants to Steven Menexas, who had executed a personal guaranty in connection with the franchise agreement. And that accordingly, the Tony Roma's representation is unrelated to this dispute, which arises out of a separate agreement between Plaintiff and DJD. Defendants assert that MSF was never retained to find a third-party restaurant manager for Plaintiff, nor does Plaintiff even allege as such.

Defendants also argue that the witness-advocate rule does not mandate disqualification where neither Rich nor any MSF attorneys are indispensable fact witnesses. Defendants contend that Plaintiff's motion is devoid of any rationale explaining why any MSF attorney is an indispensable fact witness except to state that MSF attorneys, including Jeffrey Schreiber, would be fact witnesses with respect to the April 2016 period where MSF represented SGM and Steven Menexas. Even if Rich were required to testify as a fact witness, Defendants contend that the witness-advocate rule would not be implicated because he is no longer with MSF.

Finally, with regards to Plaintiff's allegation that MSF was exposed to Plaintiff's "sensitive confidential information," Defendants submit that Plaintiff is merely using buzzwords without supporting evidence which is insufficient to meet the heavy burden of disqualification.

Discussion

The Court begins with the principle that "[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 absent a clear showing that disqualification is warranted" (*Campolongo v Campolongo*, 2 AD3d 476, 476 [2d Dept 2003]). "While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized" (*Gulino v Gulino*, 35 AD3d 812, 812 [2d Dept 2006]). Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court (*Id.*).

A party seeking disqualification of its adversary's lawyer must prove: "(1) the existence of a prior attorney-client relationship..., (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 [1996]).

Here, the Court finds that Plaintiff failed to establish the existence of a prior attorney-client relationship with MSF. There is no dispute that the prior attorney-client relationship was between MSF and SGM/Steven Menexas. Given that fact, Plaintiff fails to sufficiently explain why the Court should consider SGM/Steven Menexas and Plaintiff to be a single "client" for disqualification purposes. This is especially so considering that Plaintiff was represented by counsel, Helbraun & Levey LLP, in the negotiation and execution of the Agreement. Moreover, even if Plaintiff and SGM were deemed to be a single client for disqualification purposes, the Court finds that the two matters are not substantially related. Plaintiff emphasizes MSF's receipt or exposure to its alleged confidential information but fails to establish any connection between the early termination of a Tony Roma's franchise agreement and the instant Agreement, which relates to a restaurant management relationship between Plaintiff and DJD for the restaurant known as Atlantic Social.

With regards to whether disqualification is still warranted because MSF was exposed to Plaintiff's confidential information during MSF's representation of SGM and Steven Menexas, the Court finds that disqualification is unwarranted. In addition to the above finding that the matters are not substantially related, Plaintiff's claim that MSF is in possession or knows of confidential information disadvantageous to Plaintiff is undermined by the fact that Plaintiff

knew, at the time of the Agreement's negotiation, that Rich represented DJD and, despite Rich having previously represented SGM and Steven Menexas in another matter, there is no evidence that Plaintiff raised an issue as to Rich's representation of DJD when it entered the Agreement. In addition, the purported confidential information relating to Plaintiff's "operational strengths and weaknesses" cannot be deemed to be disadvantageous to Plaintiff in this litigation where Plaintiff relies on such information *to support* its claims of fraud against Defendants. To the extent that Plaintiff seeks to safeguard the alleged confidential information from dissemination outside of this proceeding, the parties can and should enter into a confidentiality agreement.

Finally, the Court finds that disqualification of MSF is also unwarranted pursuant to the witness-advocate rule. The witness-advocate rule contained in the Rules of Professional Conduct provide guidance, but are not binding on the court determining a disqualification motion (*Trimarco v Data Treasury Corp.*, 91 AD3d 756, 757 [2d Dept 2012]). "Rule 3.7 of the Rules of Professional Conduct provides that, unless certain exceptions apply, '[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact'" (*Id. citing* 22 NYCRR 1200; Rule 3.7 [a]). In the application of that rule, courts have held that the party seeking its application must demonstrate that the testimony of the opposing party's counsel is necessary to his or her case, not merely relevant or even highly useful (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 446 [1987]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence (*Id.*).

First, presuming Rich is an indispensable fact witness for Plaintiff, he is no longer an attorney with MSF and has not been since April or May of 2016. With regards to any other MSF attorney, Plaintiff fails to demonstrate that the testimony of any such attorney is necessary (*see Bentvena v Edelman*, 47 AD3d 651, 652 [2d Dept 2008]). Even if an MSF attorney's testimony is necessary, Plaintiff does not provide a reason to disqualify the entire firm considering that MSF is a mid-sized law firm with many attorneys (*see Talvy v American Red Cross*, 205 AD2d 143, 152 [1st Dept 1994][stating that pursuant to 22 NYCRR 1200.21[a], only the attorney-witness who will testify on behalf of the client is disqualified]).

Based upon the foregoing, Plaintiff's motion to disqualify MSF as counsel must be denied.

Defendants' Motion to Dismiss and Plaintiff's Cross-Motion to Amend

Defendants move to dismiss or stay Plaintiff's causes of action against DJD on the basis that section 12 of the Agreement reflects a broad ADR clause obligating Plaintiff and DJD to

submit "any and all disputes" plus "[a]ll other disputes...including, but not limited to...the determination of the scope or applicability of this Agreement to arbitrate..." to JAMS mediation and, thereafter, to binding JAMS arbitration. According to Defendants, because Plaintiff's claims of fraud against Defendants relate to the Agreement in general and not the ADR provision itself, the ADR provision is valid and Plaintiff's claims must be submitted to a mediator/arbitrator. In addition, Defendants move to dismiss all causes of action against the Individual Defendants and certain causes of action against DJD based on alleged pleading deficiencies.

Plaintiff's cross-motion seeks to amend its complaint to expand on its allegations, thereby purportedly curing any deficiencies, and to add the following five defendants: Three Kings of Kings County d/b/a Talde ("Talde"), Rich, SIR Consulting & Advisory Group LLC ("SIR"), William Koester ("Koester") and Kristopher Welz ("Welz"); as well as add two additional claims: breach of fiduciary duty asserted against Rich and SIR and aiding and abetting fraud asserted against Rich and SIR and separately against Koester and Welz. According to Plaintiff, the proposed amendments are extensions of the allegations already raised in the complaint and merely seek to include, comprehensively, all parties and claims stemming from the same operative facts. Plaintiff also argues that Defendants cannot be prejudiced by the proposed amendments as Defendants have yet to interpose an answer and no discovery has taken place.

With regards to that portion of Defendants' motion seeking to compel ADR, Plaintiff argues that the ADR clause is unenforceable because Rich's participation in the negotiation of the Agreement permeates the Agreement with fraud, including the ADR provision. Specifically, Plaintiff alleges that Rich, through his firm SIR, misrepresented himself as a non-attorney consultant working to help the parties toward a deal but that, in reality, Rich was a "de-facto partner of Defendants working for their sole benefit...." Plaintiff further argues that, "[f]or his wrongful efforts, Rich received an outsized portion of the fees following execution of the Agreement, ostensibly compensation for his inside knowledge of Atlantic's confidential information obtained through his prior attorney client relationship" (Verified Amended Complaint, Paragraph 38-40). Plaintiff argues that, because Rich abused his position of trust to take advantage of Atlantic, the entire Agreement was the result of fraud, including the ADR clause.

In reply, Defendants contend that Plaintiff's allegation that the Agreement is permeated with fraud is conclusory and without factual support. Defendants also maintain that Plaintiff's fraud allegations in the proposed amended complaint should be dismissed because they are either insufficiently plead or barred by the Agreement's merger clause. Further, Defendants seek

sanctions against Plaintiff and Plaintiff's prior counsel for having filed a "tactical disqualification motion" that failed to disclose to the Court material facts in connection to the motion. Specifically, Defendants state that Plaintiff omitted material facts such as the actual engagement letter between MSF and SGM/Steven Menexas and the fact that Plaintiff had counsel to negotiate the Agreement on its behalf.

Discussion

The Court first addresses the issue of enforcing the ADR clause contained in the Agreement. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration (CPLR 7503[a]). When there is no substantial question whether a valid agreement was made or complied with, the court shall direct the parties to arbitrate (*Id.*). Even if an agreement is induced by fraud, the fraud will only affect the validity of the arbitration provision if the fraud relates to the provision itself or was part of a "grand scheme that permeated the entire contract" (*Markowits v Friedman*, 144 AD3d 993, 997 [2d Dept 2016][*quoting Weinrott v Carp*, 32 NY2d 190, 198 [1973]]). Outside of this exception, the question of whether there was fraud in the inducement of the contract must be submitted to the arbitrator (*see Information Sciences v Mohawk Data Science Corp.*, 43 NY2d 918, 920 [1978]).

Here, Plaintiff does not allege that the arbitration clause itself was induced by fraud. Rather, Plaintiff alleges that the entire Agreement is permeated by fraud due to Rich's participation in its negotiation and the fact that he was previously in a position of trust vis-à-vis Plaintiff's members. However, Plaintiff's allegations are insufficient to demonstrate that the alleged fraud was part of a grand scheme that permeated the entire contract including the ADR provision. This is especially so given the fact that, as stated previously, Plaintiff knew of Rich's involvement as Defendants' representative when negotiating the Agreement and, there is no indication that Plaintiff took issue with Rich's participation at that time. Therefore, the subject ADR clause is valid and enforceable. Thus, Defendants' motion pursuant to CPLR 7503 to compel arbitration must be granted.

In addition, because the issues to be determined in ADR are inextricably interwoven with the remaining issues, including any claims alleged against proposed additional defendants who are non-signatories to the Agreement, this action must be stayed pending mediation/arbitration (*see Berg v Dimson*, 151 AD2d 362, 363 [1st Dept 1989]).

Turning then to Plaintiff's motion to amend the complaint to expand on its allegations and add new causes of action and defendants, such relief is granted. "Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay

in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit"(*Feldman v Finkelstein & Partners*, LLP, 76 AD3d 703, 705 [2d Dept 2010]). Here, the Court does not find the proposed amendments to be palpably insufficient or patently devoid of merit. In addition, Defendants and proposed new Defendants cannot claim prejudice by the amendments as this litigation is in its infancy.

Furthermore, construing Plaintiff's proposed amended complaint liberally, the Court finds that Plaintiff has cured the pleading deficiencies in its original complaint, including the allegations against the Individual Defendants. As such, Defendants' motion to dismiss all causes of action against the Individual Defendants and certain claims against DJD is denied. However, Plaintiff's claims are stayed pending arbitration.

Finally, with regards to Defendants' application for sanctions against Plaintiff and its prior counsel for having made a "tactical disqualification motion," the Court finds that sanctions are not warranted. Imposition of financial sanctions is authorized by 22 NYCRR 130-1.1[a] when an attorney or litigant's conduct is frivolous, completely without merit in law, undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. Here, the Court does not view Plaintiff's motion to disqualify as meeting any of the aforementioned criteria. Thus, Defendants' request for sanctions is denied.

Conclusion

For the reasons set forth above, it is hereby

ORDERED that Plaintiff's motion to disqualify MSF is DENIED; it is further

ORDERED that Defendants' motion to dismiss is granted to the extent that this matter shall be referred to ADR pursuant to the terms of the Agreement and that the remainder of this action is hereby stayed pending arbitration, but that the motion is otherwise denied; and it is further

ORDERED that Plaintiff's motion to amend is GRANTED.

This constitutes the Decision and Order of the Court.

E N T E R,

Sylvia G. Ash, J.S.C.