

Dollinger v Landa
2018 NY Slip Op 30365(U)
March 1, 2018
Supreme Court, Kings County
Docket Number: 502312/2014
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 March, 2018.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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DOLLINGER, GONSKI & GROSSMAN, HELEN
WEBSTER, YECHESKEL WEBSTER, BORUCH
WEBSTER, BENJAMIN WEBSTER and MOSHE
WEBSTER,

Plaintiff(s),

- against -

DECISION AND ORDER

Mot. Seq. #5

Index # 502312/2014

JUDY LANDA, DEBORAH PHILLIPSON, ANTHONY
BACCHI, M.D., STANLEY JOSEPH as Executor
Of the Estate of Martin Farbenblum, ISRAEL
SHERMAN, AHRON HERSH, ISAAC HERSH,
STEPHEN HERSH, JUDITH HERSH PARITZKY,
JOSEPH GOLDBERGER, LEVY GELLER,
HARRY W. AREM, AARON BECHER, DAVID
FRIED, JACK JANKLOWICZ, and LEONARD
JANKLOWICZ,

Defendant(s).

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The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1

Opposing Affidavits (Affirmations) _____

2

Reply Affidavits (Affirmations) _____

3

After oral argument and upon the foregoing papers, Defendants' motion to disqualify Abrams Fensterman is hereby GRANTED.

Procedural History

Defendants Anthony Baachi and Stanley Joseph, as executor of the estate of Martin Farenblum (hereinafter "the Baachi Defendants") filed a notice of motion (Mot. Seq. #5) on

January 31, 2017 seeking to disqualify the law firm of Abrams, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP (hereinafter “Abrams Fensterman”) as counsel for co-defendants Judy Landa, Deborah Philipson, Israel Sherman, Ahron Hersh, Isaac Hersh, Stephen Hersh, Judith Hersh Paritzky, Joseph Goldberger, Levy Geller, Harry W. Arem, Aaron Becher, and David Fried (hereinafter “the Hersh Defendants”). On February 22, 2017, Defendants Jack Janklowicz and Leonard Janklowicz (hereinafter the “Janklowicz Defendants”) submitted an affirmation in support of the Baachi Defendants’ motion to disqualify. On March 8, 2017, Abrams Fensterman filed an affirmation in opposition to the Baachi Defendants’ motion to disqualify. The Baachi Defendants submitted supplemental reply affirmations in further support of Mot. Seq. #5 on September 8, 2017 and December 7, 2017. On December 21, 2017, Abrams Fensterman filed a supplemental affirmation in opposition to Mot. Seq. #5.

Defendant’s Motion to Disqualify

The Baachi Defendants bring the instant motion to disqualify Abrams Fensterman from representing the Hersh Defendants in the above-captioned action. This litigation arises from the settlement of a related action entitled *Willoughby Rehabilitation and Health Care Center, LLC, et. Al. v Webster*, Nassau County, Index No. 12431/04 (hereinafter the “Willoughby action”), which was an action by several health care facilities against Helen Webster, one of the plaintiffs here. The Willoughby action settled in 2008 pursuant to a certain stipulation of settlement that settled two other related actions (*Woodmere Rehabilitation and Health Care Center, LLC, et. Al. v Rapid Medical Services, et.al*, Nassau County Index No. 015667/04 and *Webster v. Landa, et. al*, Supreme Court of the State of New York, Kings County, Index No. 16597/07). As part of the settlement, several of the principals of New Franklin Rehabilitation and Healthcare Facility, LLC and Fort Tryon Rehabilitation and Healthcare Facility, LLC, namely the Baachi Defendants and the Hersh Defendants agreed to sell their membership interests to plaintiffs Helen Webster, Yecheskel Webster, Boruch Webster, Benjamin Webster, and Moshe Webster pursuant to the membership interest purchase agreements (hereinafter “MIPAs”). The MIPAs provided for the issuance of six promissory notes (hereinafter “The Notes”) that are the subject of the above-captioned action.

The Baachi Defendants claim that Abrams Fensterman represented them and the Hersh Defendants in the aforementioned lawsuits and consequently learned sensitive and confidential information from the *Willoughby* action pertaining to the stipulation of settlement, the MIPAs, and The Notes and that such information that will adversely affect the Baachi Defendants in this

litigation because they have a conflicting interest with the Hersh Defendants as it relates to their respective allocation of The Notes.

The Baachi Defendants state that they previously moved to discharge Abrams Fensterman as their attorneys in the *Willoughby* action and the court granted that motion on January 10, 2017. The Baachi Defendants further state that the Hersh Defendants previously moved for summary judgment in the *Willoughby* action, however, the court denied that motion due to a conflict of interest between the Hersh Defendants and the Baachi Defendants. The Baachi Defendants, therefore, argue that the doctrine of collateral estoppel should apply, as this issue has already been decided by the courts.

In opposition, Abrams Fensterman argues that the Baachi Defendants have not satisfied their burden to warrant disqualification of Abrams Fensterman. Specifically, Abrams Fensterman argues that the above-captioned action is not identical to the previous action in which they represented the Baachi Defendants because there are new parties, the issue in the past action is not material to the present action, and that the Baachi Defendants' and the Hersh Defendants' interest are not materially adverse. Furthermore, Abrams Fensterman argues that collateral estoppel does not apply because the previous action in which they were disqualified is not final due to a notice of appeal that was filed challenging the order that was entered.

Discussion

A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish: "(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 (*Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 550 [2d Dept 2013]).

In the present matter, this Court finds that the Baachi Defendants have established the existence of a prior attorney-client relationship, that the matters involved in both cases are substantially related, and that the interest of the present client and former client are materially adverse. The documentary evidence shows that Abrams Fensterman represented the Baachi Defendants through several stages of litigation in the *Willoughby* action and that the *Willoughby* action is substantially related to this action. Although the two matters are not identical in claims, the above-captioned action arises out of specific facts and occurrences litigated in the *Willoughby* action, where Abrams Fensterman gained confidential information regarding the proper allocation of the proceeds from The Notes, an issue in which the Baachi Defendants and the Hersh

Defendants have materially adverse interests in this litigation. Therefore, the Baachi Defendants motion to disqualify Abrams Fensterman is hereby GRANTED.

This constitutes the Decision and Order of the Court.

E N T E R,



SYLVIA G. ASH, J.S.C.