

Matter of Max v ALP, Inc.
2018 NY Slip Op 31551(U)
February 20, 2018
Supreme Court, New York County
Docket Number: 156641/17
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42**

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In the Matter of LIBRA MAX

Petitioner

**INDEX NO.156641/17
MOT. SEQ. 002**

v

DECISION AND ORDER

**ALP, INC., a New York corporation and ADAM MAX,
in his capacity as president of ALP, Inc.**

Respondents.

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NANCY M. BANNON, J.:

In this proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the production of books and records of a corporation, the respondents move to disqualify the petitioner's counsel. The petitioner opposes the motion. The motion is granted.

I. BACKGROUND

The petitioner, Libra Max (Libra), is the sister of the respondent Adam Max (Adam). They each own a 40% interest in the respondent ALP, Inc. (ALP), a corporation that manages and promotes the artistic works of their father, Peter Max. It is undisputed that, on December 28, 2016, the petitioner's counsel, Michelle A. Rice, was introduced to Adam at a Manhattan restaurant by an intermediary, and that the purpose of the introduction was to permit Adam to consider retaining her to represent him in connection with ALP. It is also undisputed that Rice spoke for some time with Adam at the restaurant about legal issues concerning ALP and the relationship of his stepmother to him, ALP, and Peter Max.

Rice and Adam present differing accounts of whether they discussed Libra, her relationship with Adam and ALP, or any disputes between them over the management and auditing of ALP. In his affidavit, Adam avers that he "explained to Ms. Rice the history of [his] relationship with Libra, . . . informed Ms. Rice about Libra's various accusations against [him] and her opposition to [him in their] father's ongoing guardianship proceeding." He states that he "explained to Ms. Rice the issues [he] had with the actions taken by Libra and her then-

counsel in connection with obtaining information and records from ALP, . . . [that he] was concerned that both Libra and [his] stepmother, Mary, would attempt to gain control of ALP and its assets." In his affidavit, Adam describes in detail that he told Rice that he was concerned that Libra would align herself with the guardian of their father's property in order to gain control of ALP and dismiss him as a director, despite having no understanding of the issues surrounding guardianship proceedings and their implications for ALP, and that he was concerned about negative press coverage of his family and him. He asserts that he told Rice that Libra would not listen to his explanations of ALP's operations since she had not been involved in managing the company since 2000, and that she had made numerous "problematic decisions" with respect to artwork owned by ALP in the recent past, with several key employees threatening to resign if Libra took control of ALP. Adam further attests that he told Rice that he had evidence that Libra and his stepmother removed valuable assets from the company, and that he provided details of the amount and nature of those assets. Rice alleges in her affirmation that she has "no recollection of any discussion of Adam Max's sister, Libra Max, or of any statement by Adam Max that ALP was refusing to provide documents or information to a director, whether his sister or someone else." As Rice explains it, only five months after she met Adam, Libra was referred to her and retained her to prosecute the instant proceeding against Adam and ALP to compel them to provide her with access to ALP's books and records. Libra commenced this proceeding on July 24, 2017.

II. DISCUSSION

"Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 131 (1996). Thus, a party seeking to disqualify an attorney for an opposing party on the ground of a conflict of interest has the burden of demonstrating: (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. See Tekni-Plex, Inc. v Meyner & Landis, *supra*; Mediaceja v Davidov, 119 AD3d 911 (2nd Dept. 2014); Campbell v McKeon, 75 AD3d 479 (1st Dept. 2010); Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9. As explained by the Appellate Division, First Department, a movant who establishes the existence of a previous attorney-client relationship may satisfy his or her burden not only by demonstrating a substantial relationship between the matters involved in both representations, but also by showing that the attorney's activities in the pending legal matter would impinge on the movant's interests as a former client

that the attorney had once been retained to advance or protect, *or* by showing that the attorney had access to confidential materials substantially related to the pending litigation *or* by showing that the attorney has a direct and substantial stake in the outcome of the pending litigation. See District Council 37 v Kiok, 71 AD2d 587 (1st Dept. 1979). A preliminary consultation between an attorney and an adverse party regarding whether the attorney should be hired to represent that party in a matter bearing a substantial relationship to the present litigation may be the basis for disqualification. See Cohen v Cohen, 125 AD3d 589 (2nd Dept. 2015); Pellegrino v Oppenheimer & Co., Inc., 49 AD3d 94 (1st Dept. 2008); Leisman v Leisman, 208 AD2d 688 (2nd Dept. 1994).

Since the "substantially related" standard is now the norm (see Sessa v Parrotta, 116 AD3d 1029 [2nd Dept. 2014]; Reem Contr. Corp. v Resnick Murray St. Assoc., 43 AD3d 369 [1st Dept. 2007]; Medical Capital Corp. v MRI Global Imaging, Inc., 27 AD3d 427, 812 NYS2d 118 [2nd Dept. 2006]), the fact that an attorney has learned of some of a former client's financial information and corporate structure in prior litigation is not in and of itself a basis for disqualification. See NY St Bar Assn Comm on Prof Ethics Op 628; see also Abselet v Satra Realty, LLC, 85 AD3d 1406 (3rd Dept. 2011). Thus, in the absence of a violation of an ethical or disciplinary rule, the mere appearance of impropriety alone is insufficient to warrant disqualification, and, in any event, any appearance of impropriety must be balanced against a party's right to the counsel of his or her choice as well as the possibility that the motion for disqualification may be motivated purely by tactical considerations. See Develop Don't Destroy Brooklyn v Empire State Dev. Corp., 31 AD3d 144 (1st Dept. 2006); Christensen v Christensen, 55 AD3d 1453 (4th Dept. 2008).

The balance of considerations favors disqualification here. Adam provides the court with detailed evidence that, prior to Rice's retention by Libra, he (1) discussed with Rice the very issues that must be adjudicated here and the adversarial relationship between his sister and him, and (2) provided Rice with confidential information concerning those issues. In opposition to Adam's detailed recitation of the confidences he shared with Rice, and how they will have an impact upon the instant litigation, Rice can only aver that she has no recollection of discussing anything about Libra with Adam, even though she provides an otherwise detailed recitation of every other discussion that occurred at the restaurant on the day of her meeting. Adam has thus satisfied his burden on this motion, and Rice has presented nothing of substance to rebut his showing. Consequently, disqualification is warranted.

The court notes that it did not consider any reply papers.

III. CONCLUSION

Accordingly, it is

ORDERED that the respondents' motion to disqualify Michelle A. Rice and Kaplan Rice, LLP, as attorneys for the petitioner is granted, and those attorneys are disqualified from representing the petitioner in this proceeding; and it is further,

ORDERED that the respondents shall serve a copy of this order with notice of entry personally upon the petitioner by overnight mail service and upon disqualified counsel by e-filing; and it is further,

ORDERED that the disqualified attorneys shall forward a notice directing their former client to appoint a substitute attorney within 30 days from the date of mailing the notice, and the client shall comply therewith; and it is further,

ORDERED that any new attorney retained by the former client of the disqualified attorneys shall file a notice of appearance with the Trial Support Office (Room 158) and the Clerk of the Part within 30 days from the date of the notice to retain new counsel; and it is further,

ORDERED that all proceedings are stayed and no further proceedings may be taken against the former client without leave of this court for a period of 30 days after service upon the former client of the aforesaid notice to appoint a substitute attorney; and it is further,

ORDERED that the oral argument on the petition (SEQ 001) is adjourned from March 6, 2018, until April 25, 2018.

This constitutes the Decision and Order of the court.

Dated: February 20, 2018



NANCY M. BANNON