SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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DAVID KRAMER,

Plaintiff, Decision and order

- against - Index No. 501793/17

ms #1,2,3

MERIDIAN CAPITAL GROUP LLC, RALPH HERZKA & ELLIOT TREITEL,

Defendants, August 24, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The defendants further seek to enjoin the plaintiff from asserting any claims against defendants concerning Van Cortland Villages LLC and for sanctions. The plaintiff has cross-moved seeking to disqualify the defendant's counsel, Morrison & Cohen LLP from representing the defendants. The defendants filed a further cross-motion seeking sanctions. The motions have been opposed respectively, papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On August 17, 2007 an entity Van Cortland Villages LLC [hereinafter 'VCV'] acquired the deed to premises located at 3605 Sedgwick Avenue in Bronx County. The plaintiff, David Kramer was a managing partner of VCV. VCV borrowed $19.6 million secured by a mortgage in the property from New York Community Bank. Defendant Meridian was the mortgage broker in connection

with that loan. During 2010 VCV sought to modify the terms of the loan and again Meridian was hired to assist in that refinancing effort. An agreement was reached and memorialized in a Term Sheet signed on October 10, 2010. VCV defaulted on the loan and on January 31, 2012 VCV commenced a bankruptcy proceeding. VCV filed an adversary proceeding against the defendant's herein alleging the defendant's failed to follow the instructions they provided during the refinancing negotiations and that the defendants bound VCV to the Term Sheet without authorization. VCV alleged the defendants committed forgery signing on VCV's behalf without authorization. On January 11, 2013 the Bankruptcy Court confirmed VCV's bankruptcy liquidation plan. Pursuant to that plan all claims asserted against the defendants were transferred to VCV's secured lender. The secured lender has never pursued those claims.

During October 2016 VCV commenced an action against the defendants asserting the same causes of action that had been assigned to the secured creditor. That action was subsequently withdrawn. On January 27, 2017 the plaintiff David Kramer a member of VCV instituted the within lawsuit alleging the same causes of action against the defendants, namely the defendants acted fraudulently in binding VCV to the Term Sheet without authorization. A motion to dismiss has been filed by the

defendants alleging the plaintiff, who was not even a signatory to the Term Sheet, in any event, cannot assert these claims since they have been transferred to the secured creditor.

The plaintiff has filed a cross-motion seeking to disqualify defendants' counsel on the grounds he sought to hire the same counsel in this very matter. This motion is based upon three factors. First, plaintiff argues that Morrison & Cohen represented him in a matter that involved the New York State Attorney General. Second, the plaintiff asserts he met with David Scharf, a member of Morrison & Cohen and disclosed to him the claims he believed he maintained against the defendants and "after about 20 minutes" was informed by Mr. Scharf that he could not represent the plaintiff because Morrison & Cohen represented the defendants in this matter, thus, a conflict existed (see, Affidavit of David Kramer, ¶ 9). Third, plaintiff argues Morrison & Cohen admitted a conflict existed when plaintiff sought Morrison & Cohen's help in yet a third matter.

Conclusions of Law

It is well settled that a party seeking to disqualify its adversary's counsel based upon counsel's alleged prior representation of the moving party must establish the

existence of a prior attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations were substantially related, and that the interests of the present client and former client are materially adverse (see, Gjoni v. The Swan Club Inc., 134 AD3d 896, 21 NYS3d 341 [2d Dept., 2016]).

Concerning the fact Morrison & Cohen represented the plaintiff in a prior matter, it is undisputed such representation took place. That matter involved an unrelated entity owned by the plaintiff, Colonial Management Group LLC that was subject to an investigation by the Office of the Attorney General of the State of New York. It did not involve any of the parties in connection with VCV and terminated in July 2016. The plaintiff does not assert the Attorney General matter was substantially related to this matter. Thus, that representation cannot form the basis for disqualification. Equally irrelevant is an alleged admission by Morrison & Cohen that a conflict existed. In June 2017 the plaintiff sought refinancing in another property and disclosed the Attorney General matter trying to forestall any potential issues it might raise. The lender sought a letter from plaintiff's counsel insuring the Attorney General matter had been satisfactorily resolved. The lender providing the refinancing

was also represented by Morrison & Cohen and reached out to the law firm seeking the letter. Morrison & Cohen responded they first had to resolve "the Meridian issue" (see, Email sent by Morrison & Cohen, dated June 8, 2017). In a subsequent email Morrison & Cohen explained that the plaintiff was seeking the letter from them which essentially consisted of new legal work. Since the plaintiff sued Meridian, a client of Morrison & Cohen, such legal representation could not be undertaken without a waiver of any conflict of interest. That does not mean a conflict existed when the representation for the Colonial matter was first undertaken. Morrison & Cohen's request for a waiver was a reasonable precaution considering it would be representing opposing parties in the same litigation, albeit in another matter. Therefore, no such conflict is raised thereby and that cannot serve as a basis for disqualification.

The real conflict alleged is the assertion the plaintiff revealed litigation strategy and confidences to Morrison & Cohen for twenty minutes and was only then told they could not represent the plaintiff since they already represented the defendants. First, Morrison & Cohen deny any such meeting took place. Indeed, there is no independent evidence corroborating the existence of any meeting. Further, Mr.

Kramer submitted an affidavit dated May 30, 2018 wherein he stated he visited the offices of Morrison & Cohen during July 2014 and that after disclosing key litigation information Morrison & Cohen informed Kramer they could not take the case since they represented the defendants. However, on August 1, 2018 Mr. Kramer submitted a new affidavit wherein he asserted the meeting did not take place during July 2014 but rather during December 2013 or January 2014, a full half a year before the stated date in the original affidavit. Further, the new affidavit contains the assertion that another individual, Joel Ciment, was also present at that meeting. Indeed, Mr. Ciment has submitted an affidavit dated August 1, 2018 confirming he was present at the meeting in January 2014.

However, the affidavits of Mr. Ciment and the plaintiff differ in key respects to the point neither can be utilized to establish a basis for disqualification. The first affidavit submitted by Mr. Kramer makes clear the entire purpose of the alleged meeting was to seek to hire Morrison & Cohen in this litigation. According to the affidavit of Mr. Ciment the purpose of the meeting concerned the Attorney General matter. Thus, Mr. Ciment states that "it was in connection to the TRIBORO issues that I attended a meeting with Plaintiff

and Mr. Scharf" (see, Affidavit of Joel Ciment, ¶ 7). According to Mr. Ciment, at some point the conversation with Mr. Scharf turned to this litigation. Mr. Kramer's second affidavit asserts the entire meeting was about this litigation. This discrepancy is critical since it raises serious questions establishing the nature of the meeting and the role of Mr. Ciment. Moreover, as noted, Morrison & Cohen denies the meeting ever even occurred. While it is true that where there is a doubt concerning the specific items discussed then such doubts are resolved in favor of disqualification (Rose Ocko Foundation Inc., v. Liebowitz, 155 AD2d 426, 547 NYS2d 89 [2d Dept., 1989]) there must be evidence of some disclosure. If any party can merely allege, without any substantiation, that a meeting occurred and confidences were discussed then no attorney client relationship is safe from disqualification. Any litigant at any time can assert, without any proof at all, that the litigant contacted the opposing litigant's counsel and therefore the counsel must be disqualified. Surely, the power to allege disqualification cannot be exercised without evidence establishing the need for such disqualification. As the court stated in Colebrook, Bosson and Saunders, Inc. v. Satelozzi, Inc., 31 Misc3d 1221(A), 930 NYS2d 174 [Supreme Court New York County 2011],

"conclusory and unsubstantiated allegations are insufficient to establish an attorney-client relationship" (id). Indeed, without sufficient evidence establishing the existence of communications that might be grounds for disqualification the moving party has failed to establish any communications are substantially related to any representation (Gjoni, supra).

Therefore, based on the foregoing, the motion seeking disqualification is denied. Consequently, the motion seeking to dismiss the complaint is granted. Further, the motion seeking an injunction preventing the plaintiff from asserting any further claims in this VCV matter is granted. The plaintiff is enjoined from pursuing any further claims without prior court approval.

Lastly, any motions seeking sanctions are denied.

So ordered.

ENTER:

DATED: August 24, 2018
Brooklyn NY

Hon. Leon Ruchelsman
JSC