SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the matter of the Application of

SEAN WIENER,

Petitioner,

-against-

BLAINE BRAUNSTEIN, BILLY MARVA, DAVID GABER and ARROW SEARCH PARTNERS, LLC,

Respondents.

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DECISION AND ORDER
Index №.: 650853/19
Motion Seq. Nos. 001

CAROL R. EDMEAD, J.S.C.:

Petitioner, by Order to Show Cause, brings an application pursuant to CPLR 7502 and the New York Rules of Professional Conduct (22 NYCRR 1200) to disqualify respondents' counsel in an arbitration proceeding before the American Arbitration Association entitled *Weiner v Braunstein et. al.*, Case No. 01-18-0004-3567.

BACKGROUND

Like petitioner Sean Wiener (Wiener, or Petitioner), respondents Blaine Braunstein (Braunstein), Billy Marva (Marva), David Gaber (Gaber), are members of respondent Arrow Search Partners, LLC (Arrow Search) (collectively, Respondents). Arrow Search is an executive recruiting firm whose operating agreement was executed in February 2018. Under that agreement, Wiener and the three individual respondents have 25% ownership stakes in Arrow Search (*see* NYSCEF doc No. 3).

The relationship between the parties soured, leading to the arbitration proceeding. In that proceeding, Petitioner brings three causes of action: (1) breach of contact against the individual respondents; (2) breach of fiduciary duty against the individual respondents; and (3) declaratory

relief against Respondents, including as to Petitioner's entitlement to access to Arrow Search's records, as well as an order precluding the enforcement of any restrictive covenants in the operating agreement.

On November 18, 2018, Petitioner brought an application for interim relief in the arbitration proceeding, which sought, among other things, to disqualify Respondents' counsel. The application was granted only to the extent that Petitioner was allowed access to Arrow Search's books and records (*see* NYSCEF doc No. 5). As to Petitioner's application to disqualify, the arbitrator determined that he did not have authority to determine that branch of the application. Accordingly, Petitioner filed this special proceeding, by Order to Show Cause, on February 1, 2019.

Respondents are represented, here and in the arbitration proceeding, by The Law Offices of Neal Brickman, P.C. (Brickman). Brickman began its relationship with Arrow Search prior to formation. While Brickman did not draft the operating agreement, it did consult on it before the agreement was executed. Brickman submitted an invoice to Petitioner and individual respondents for this work (NYSCEF doc No. 6). Brickman also represented Petitioner, Gaber, Merva, and Arrow when they were sued by Green Key LLC, the former employer of Petitioner, Gaber, and Merva. That action, entitled *Green Key, LLC v Wiener* et. al. (index No. 650889/18) was resolved pursuant to a settlement agreement (*see* NYSCEF doc No. 7). Petitioner argues that Brickman's prior work on his behalf, as well as Brickman's current work as Arrow Search's general counsel, presents a conflict. Petitioner contends that the conflict is plain, as he is still a member of Arrow Search.

DISCUSSION

Pursuant to New York Rules Professional Conduct, Rule 1.9, entitled "Duties to former clients," provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
> (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
> (1) whose interests are materially adverse to that person; and
> (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

(22 NYCRR 1200).

The First Department has held that "[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" (*Deerin v Ocean Rich Foods, LLC*, 158 AD3d 603 [1st Dept 2018]). "Disqualification of a law firm during litigation," the Court of Appeals has held, "implicates not only the ethics of the profession but also the substantive rights of the litigants" (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69

NY2d 437, 443 [1987]). This requires a balancing, as not only the former client's rights are at issue. Courts have long recognized that "[a] party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Lucianco v Kennedy*, 151 AD3d 957, 958 [2d Dept 2017] [internal quotation marks and citation omitted]). Finally, while "[t]he party seeking to disqualify the law firm or an attorney bears the burden to show sufficient proof to warrant such a determination … doubts as to the existence of a conflict of interest are resolved in favor of disqualification in order to avoid even the appearance of impropriety" (*Deerin*, 158 AD3d at 607-608).

Deerin pitted an LLC and its two surviving members against the executor of the third member's estate. The firm against whom the motion for disqualification was made represented the two living members and the LLC itself. The First Department found that disqualification was appropriate, reasoning:

> "the plaintiff alleged in an affidavit that the defendants' counsel was involved in the formation of [the LLC], and the defendants' counsel admitted that he had represented Ocean Rich in 'various past matters.' Counsel's prior representation of Ocean Rich was in fact repreth sentation of its shareholders, whose competing interests are at issue in this action. Likewise, counsel's involvement in the formation of Ocean Rich and his representation of it against third parties was substantially related to the present action. Since the defendants' counsel was in a position to receive relevant confidences from the decedent, whose estate's interests are now adverse to the defendants' interests, the Supreme Court should have granted that branch of the plaintiff's cross motion which was to disqualify the defendants' counsel"

(158 AD3d at 608 [internal quotation marks, citation, and parentheticals omitted]).

Deerin also provides something close to a bright line rule in cases with factual patterns common to itself and the present action: "'One who has served as attorney for a corporation may not represent an individual shareholder in a case which his interests are adverse to other

shareholders'" (*id.* quoting *Morris v Morris*, 306 AD2d 449, 452 [2d Dept 2003]). *Deerin* explicitly applied this principle in the context of a general counsel for an LLC.

Here, Brickman has served, and is currently serving, as counsel for Arrow Search. Moreover, Brickman is representing individual members in the arbitration proceeding, where their interests are plainly adverse to another members interests. Thus, under *Deerin*, Petitioner's application for disqualification of Brickman in the arbitration proceeding must be granted.

Respondents' attempts to distinguish *Deerin* are unpersuasive. Brickman, like counsel in *Deerin*, was involved in the formation of the LLC, and has represented Arrow Search, as well as Petitioner himself, in past matters. Respondents contend that Brickman "was merely consulted with as part of the process of preparing and finalizing the operation agreement" (NYSCEF doc No. 21 at 11). Use of the passive voice does not obscure that Brickman was involved in the formation of the LLC. Similarly, Respondents argument that Brickman "engaged in a limited and discrete representation of Gaber and Wiener to resolve their disputes with a former employer," is a distinction without a difference.

Like counsel in *Deerin*, Brickman was "in a position to receive relevant confidences" from Wiener (158 AD3d at 608). While Respondents argue that Petitioner has not pointed to specific confidences he entrusted to Brickman, no such level of specificity was required by the First Department in *Deerin*. As disqualification is required under *Deerin* to remove the appearance of impropriety, Petitioner's application for disqualification of Brickman in the arbitration proceeding must be granted.

CONCLUSION

Accordingly, it is

ORDERED that Petitioner's application to disqualify respondents' counsel, The Law Offices of Neal Brickman, P.C., in an arbitration proceeding before the American Arbitration Association entitled *Weiner v Braunstein et. al.*, Case No. 01-18-0004-3567 is granted; and it is further

ORDERED that Petitioner is to serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: April 22, 2019

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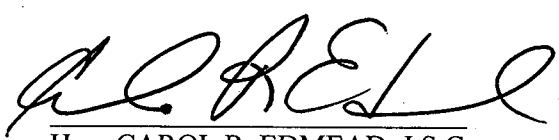

Hon. CAROL R. EDMEAD, J.S.C.

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