SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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426 REALTY ASSOCIATES, LLC, 456 REALTY ASSOCIATES, LLC,

Plaintiffs,

- v -

CASE LYNCH, ALAN FRIED, ESTATE OF CONNIE BLOOM FRIED,

Defendants.

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INDEX NO. 655323/2016

MOTION DATE

MOTION SEQ. NO. 012, 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 344-345 were read on this motion to disqualify counsel.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 350-394 were read on this motion to disqualify counsel.

By notice of motion, defendant Alan Fried moves pursuant to 22 NYCRR § 1200.00 and Rules 1.6, 1.7(a) and 8.4(c) of the New York State Rules of Professional Conduct for an order disqualifying the law firm of Tuan Olona, LLP and Jonathan Miller, Esq. from representing plaintiffs in this action, and pursuant to CPLR 3122 for an order staying discovery pending resolution of the motion (seq. 12). Plaintiffs, LLP, and Miller (collectively, counsel) oppose.

By order to show cause, defendant Lynch moves for an order disqualifying counsel and directing plaintiffs to engage non-conflicted counsel within 30 days, staying the action pending the motion's resolution, and awarding defendants reasonable costs and attorney fees associated with the motion (seq. 13). Plaintiffs oppose.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

A. Parties' relationships (NYSCEF 221)

Plaintiff LLCs were created by the Resnisk and Bloom families to hold title to real estate in Manhattan, with plaintiff 426 Realty owning 426 West 55th Street and plaintiff 456 Realty Associates owning 456 West 55th Street. When the LLCs were formed, they were each owned equally by the JLJM Trust, formed by Samuel and Amy Resnick, and the Wilton Trust, formed by Sidney and MaryLouise Bloom. The beneficiaries of the JLJM trust were the four Resnick children, and of the Wilton Trust, the two Bloom children.

Each trust provides for its termination on the death of both of the settlors, with the surviving trustee directed to pay over and distribute to the beneficiaries the entire remaining trust corpus, and if a beneficiary dies during the term of the trust, then his or her respective share is to be held for the benefit of his or her issue then living, in equal shares and per stirpes.

By 2009, both Resnicks had died, and thus by its terms the JLJM Trust was to have distributed its interests in the two LLCs to the four Resnick children as primary beneficiaries. As MaryLouise Bloom is still alive, the Wilton Trust allegedly continues to own 50 percent of the LLCs.

As of 2009, LLP was and is legal advisor of the JLJM Trust.

Fried is the executor of the Estate of Connie Fried and the trustee of the Wilton Trust. His wife, Connie Bloom Fried, was a beneficiary of the Wilton Trust and on her death, their children acquired a 25 percent interest in the LLCs.

Plaintiffs' operating agreements provide for the appointment of four managers per LLC, namely, two Resnick representatives and two Bloom representatives. Fried and Jonathan Resnick, Samuel Resnick's son, were two of the four appointed managers. Jonathan became

plaintiffs' de facto manager, and until recently, he handled all of the banking, bills, accounting, taxes, issuance of distribution checks to the beneficiaries, and maintenance of the two buildings.

Samuel Resnick and Sidney Bloom had also formed Barbizon Electric Company, the management and control over which was gradually assumed by Jonathan and Lynch, Bloom's son-in-law. Barbizon occupied 456 West 55th Street pursuant to a lease executed in 1985 with plaintiff 456 Realty as landlord. Although the lease expired in 2015, Barbizon continues to occupy the premises as a holdover tenant. LLP is also alleged to represent Barbizon.

Sometime after both settlors of the JLJM Trust had died, questions were raised as to whether the trust had terminated and its corpus disbursed to its beneficiaries.

In 2017, Jonathan died and Alan took over management of plaintiffs. In December 2017, when the beneficiaries of both trusts were due to receive distributions checks, Alan learned that Jonathan's wife was the beneficiary of the trust after Jonathan's death pursuant to an amendment or modification. Alan then contacted plaintiffs' counsel for more information about the JLJM Trust, and in December 2017, he was advised by Han Tuan of LLP, that the JLJM Trust amendment or modification document was dated as of February 17, 2009, and that upon Amy Resnick's death in 2009, the trust terminated and its property distributed to the four beneficiaries. At some point thereafter, the four beneficiaries transferred their interest into a new JLJM Trust, of which Jonathan's wife, Susan Resnick, had become primary beneficiary.

As Alan had concerns about the validity of the JLJM Trust, he ceased making distributions to its beneficiaries.

B. Procedural history

In October 2016, plaintiffs commenced this interpleader action, seeking a determination as to the current owner of a 25 percent interest in each LLC and proper distributee, and alleging

that a dispute exists as to whether the Wilton Trust had conveyed half of its interest in each LLC to the late Connie Bloom Fried. They also contend that a dispute exists as to whether Lynch had resigned as co-trustee of the Wilton Trust and whether Alan was authorized to effect the alleged conveyance from the Wilton Trust to Connie. (NYSCEF 1).

In the complaint, plaintiffs allege that the JLJM Trust owned and continues to own the other 50 percent ownership in the LLCs. The complaint was filed by Miller, as counsel to LLP. (*Id.*).

In December 2016, Alan, as Trustee of the Wilton Trust and Executor of Connie's Estate, filed his answer with cross claims and counterclaims. (NYSCEF 4). Lynch, as trustee of the Wilton Trust, did the same. (NYSCEF 6).

In January 2018, Abigail Bloom Lynch was granted leave to intervene in the action. (NYSCEF 137).

In January 2019, Alan filed a motion to disqualify plaintiffs' counsel (seq. seven), which is apparently a duplicate of one he filed under motion sequence 12.

The parties have engaged in several discovery conferences. Currently pending are three discovery motions and a summary judgment motion filed by plaintiffs.

Sometime in 2018 or 2019, defendants reached settlement on the claims between them, which would have potentially resolved the entire action. Plaintiffs and/or counsel did not participate in the settlement discussions, and did not agree to the settlement.

II. CONTENTIONS

A. Defendants (NYSCEF 351, 362)

Defendants argue that plaintiffs' counsel is impermissibly conflicted by his professional relationship with plaintiffs and non-parties the JLJM Trust, members of the Resnick family, and

Barbizon, whose interests are "potentially adverse" in this action. They identify six grounds:

(1) counsel simultaneously represents the interests of the JLJM Trust, certain members of the Resnick family, and Barbizon, whose interests conflict with plaintiffs, which counsel also represents;

(2) counsel erroneously advised plaintiffs that the JLJM Trust had a 50 percent membership in plaintiffs;

(3) counsel misrepresented in the complaint that the JLJM Trust owned 50 percent of plaintiffs;

(4) counsel refuses to resolve the action unless and until defendants concede the validity of the JLJM Trust's membership interests;

(5) counsel recognized a purported vote of plaintiffs' membership that included the JLJM Trust and which resulted in the replacement of plaintiffs' manager with one of the Resnick's financial advisors, who then fired attorneys who had replaced counsel at some point during this action, and re-hired counsel. In order to do so, counsel recognized the validity and existence of Connie's 25 percent membership in plaintiffs, although it now disavows it; and

(6) counsel has taken "subsequent, continued and costly positions" in this action in denying the validity of Connie's membership interest, to the benefit of counsel's other clients, the JLJM Trust and the Resnicks.

According to defendants, counsel "long had a conflict of interest which precluded their representation" of plaintiffs before the commencement of this action, that there was a "long-standing conflict" that existed at the time of commencement between counsel's representation of plaintiffs and Barbizon, and all of the conflicts existed before the action commenced as counsel

has been representing the Resnick family and JLJM Trust since 2009 and also represented Barbizon for many years and "well before this action was initiated." (NYSCEF 221).

Defendants also claim that counsel is impermissibly self-interested in the subject matter of this action, observing that the disputes at issue among the various parties "have the potential to harm [counsel's] reputation and may lead to malpractice claims." They also contend that the advocate-witness rule precludes counsel's representation, as it is "obvious and undeniable" that counsel "may well be required" to give testimony adverse to its clients.

B. Plaintiffs' counsel's opposition (NYSCEF 367)

Counsel denies any conflict of interest between its current clients as the interests of the LLCs and the JLJM trust are aligned and alleges that defendants lack standing to move for disqualification, absent a prior or current attorney-client relationship between counsel and defendants. It observes that as defendants were concededly aware of counsel's representation of plaintiffs and the non-parties for at least a decade and did not seek disqualification for at least two years and not until counsel refused to consent to the proposed settlement, they thereby waived an objection to the continued representation. Counsel also denies that it represents Barbizon in any lease negotiations with the LLCs and notes that Barbizon is not a party here and has no interest in how this action is resolved.

Counsel denies that it is self-interested and/or subject to the advocate-witness rule, absent a showing by defendants as to how counsel is a witness and/or expected to give testimony adverse to plaintiffs on a subject at issue in this action.

C. Oral argument (NYSCEF 390)

At oral argument, defendants argued that they had standing to move to disqualify counsel as they are either managers or beneficiaries of the LLCs. They deny having waived their

objection, asserting that the conflict did not arise or cause an issue until the parties attempted to settle the action in 2018 or 2019. They also contend that there is new evidence that the JLJM's Trust amendment or modification was fraudulently backdated, with counsel's assistance, to appear valid as of 2009, rather than having been written during this litigation.

III. ANALYSIS

A. Conflicts of interest

1. Applicable law

As an attorney owes a duty of confidentiality and loyalty to his or her client, the attorney must avoid not only the fact, but the appearance of representing conflicting interests. (*Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123 [1996]). Thus, pursuant to section 1.7 of the Rules of Professional Conduct, an attorney may not act as an advocate in a matter where he or she has a conflict of interest with his or her current client.

As disqualification conflicts with the policy favoring a party's representation of counsel of its choice, the party moving for disqualification must establish that: (1) a prior attorney-client relationship existed between the moving party and opposing counsel, (2) the matters involved in both representations are substantially related, and (3) the interests of the present and former client are materially adverse. (*Tekni-Plex, Inc*., 89 NY2d at 131).

Whether to disqualify an attorney from continuing to represent his or her client lies within the sound discretion of the court, and doubts as to the existence of a conflict of interest must be resolved in favor of disqualification to avoid the appearance of impropriety. (*Delaney v Roman*, 175 AD3d 648 [2d Dept 2015]).

2. Waiver

A delay in seeking disqualification may constitute a sufficient basis on which to deny the

motion. (*Cf Wiederman v Halpert*, 172 AD3d 1442 [2d Dept 2019] [delay of few weeks minimal and insufficient to show waiver]). Thus, it must be determined when the alleged conflicts of interest arose to determine if the movant could have sought relief earlier. If the movant "was aware or should have been aware of the facts underlying the alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation." (*Hele Asset, LLC v S.E.E. Realty Assocs.*, 106 AD3d 692, 693-694 [2d Dept 2013]).

Defendants not only knew before the action was commenced in 2016 that counsel represented both the plaintiffs and the JLJM trust, the Resnick family, and Barbizon, but they were aware of it for years before the action commenced and took no action to disqualify it until 2018, at earliest. Having been aware of the alleged conflict of interest for at least two years, defendants' delay in moving to disqualify constitutes a waiver of their objection to the representation. (*See Stilwell Value Partners IV, L.P. v Cavanaugh*, 123 AD3d 641 [1st Dept 2014] [even if conflict of interest existed, plaintiff waived objection by waiting more than two years to seek disqualification]; *Lake v Kaleida Health*, 60 AD3d 1469 [4th Dept 2009] [same]; *St. Barnabas Hosp. v New York City Health and Hosps. Corp.*, 7 AD3d 83 [1st Dept 2004] [movant knew when it commenced action that there was conflict of interest but took no action for one year, thereby waiving objection]; *see also In re Estate of Peters*, 124 AD3d 1256 [4th Dept 2015] [despite showing that attorney had conflict of interest, movant nevertheless waived objection to it by waiting one year to move to disqualify attorney]). Defendants cite no authority for the proposition that they need not have moved to disqualify until the alleged conflicts of interest negatively impacted resolution of the action.

3. Standing

A party seeking to disqualify another party's attorney on conflict of interest grounds must have standing to do so based on either being a present or former client of the subject attorney. (*Campbell v McKeon*, 75 AD3d 479 [1st Dept 2010]; *A.F.C. Enter., Inc. v New York School Constr. Auth.*, 33 AD3d 736 [2d Dept 2006]). If the attorney never represented the moving party, it cannot have breached a fiduciary duty to that party. (*Ellison v Chartis Claims, Inc.*, 142 AD3d 487 [2d Dept 2016]).

It is undisputed that counsel does not and has never represented defendants in this or any other action. Defendants contend, however, that they have standing as they are parties to the Wilton Trust, which is a member of plaintiffs, in effect arguing that they are clients of counsel.

Acceptance of defendants' argument would mean that if a company sues one of its shareholders or members, any attorney hired by the company would at all times have a conflict since it would in theory be representing both the company and the shareholder or member, resulting in a situation where a company could never hire an unconflicted attorney. Defendants, who bear the burden of establishing that they are former or current clients of counsel, cite no caselaw in support of their argument. (*See See Shah v Ortiz*, 112 AD3d 543 [1st Dept 2013] [movant's failure to meet burden of establishing prior attorney-client relationship fatal to motion to disqualify under rule 1.7]).

Nor may defendants claim that they are somehow united in interest with plaintiffs such that they could be represented by the same attorney, as they are adverse parties in this action and defendants have asserted counterclaims against them. (*Gorman v Pattengell*, 145 AD2d 411 [2d Dept 1988] [interests of parties on counterclaim were adverse and thus conflict of interest existed]; *cf Stilwell Value Partners IV, L.P. v Cavanaugh,* 123 AD3d 641 [1st Dept 2014]

[interests not adverse as cross claims had not been asserted between defendants]).

4. LLP's alleged conflicts

Even if defendants have standing and have not waived their objection, they fail to demonstrate that a conflict of interest among plaintiffs, the JLJM Trust, members of the Resnick family, and Barbizon, absent any indication of how their interests are adverse in this litigation. That counsel will not agree to settle this action on the terms proposed by defendants, and even if its condition to agree to the settlement would allegedly benefit its non-party clients, does not constitute sufficient proof that plaintiffs and the non-parties have adverse interests, and the other issues raised by defendants evince no conflict between any current or former client of LLP but rather involve alleged actions taken by counsel that defendants deem fraudulent, inconsistent or contradictory, and/or obstreperous. Even if a conflict exists between counsel's alleged representation of plaintiffs and Barbizon, the landlord-tenant matter between them is not in issue here.

B. Self-interest

Rule 1.7(a)(2) of the Rules of Professional Conduct prohibits a lawyer from accepting employment if her exercise of professional judgment on behalf of her client will or reasonably may be affected by the lawyer's own personal interests. Defendants speculate that counsel is self-interested in the outcome, in that an outcome adverse to its clients may harm its reputation and lead to malpractice claims. All attorneys face various fruits of client dissatisfaction when undertaking representation. They thus fail to establish a significant risk that counsel's professional judgment on behalf of its clients is or will be adversely affected by counsel's own conflicting interests.

C. Advocate-witness rule

Pursuant to Rule 3.7 of the Rules of Professional Conduct, an attorney may not act as an advocate in a matter "where it is likely that [he or she] will be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client, or where the attorney knows he or she is likely to be a witness on a significant issue of fact on the client's behalf." (*Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). As disqualification impacts a party's right to be represented by counsel of its choice, the movant bears the "heavy burden" of demonstrating that counsel will be called as a witness and how such testimony would be adverse to plaintiff. (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016], *affd* 31 NY3d 1002 [2018]; *Broadwhite Assocs. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]).

As the sole issue in this litigation is whether the Wilton Trust remains a 50 percent member of the LLCs or whether Connie acquired a 25 percent interest in the Wilton Trust, defendants set forth no subject for which plaintiffs' counsel would be called as a witness here or how its testimony would be adverse to plaintiffs.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that both motions to disqualify are denied, and any stays imposed in the order to show cause are hereby vacated and lifted.

10/4/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE