

Paul v Davidson

2021 NY Slip Op 30576(U)

February 26, 2021

Supreme Court, New York County

Docket Number: 158999/2017

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

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INDEX NO. 158999/2017

GARY PAUL,

MOTION DATE 10/22/2020

Plaintiff,

MOTION SEQ. NO. 005

- v -

LAWRENCE DAVIDSON, ALDOUS DAVIDSON, JANET AMIDGI, 106-108 WEST 87TH STREET OWNERS CORP., CORNERSTONE MANAGEMENT SYSTEMS, INC., FRANK BRUSCO MAINTENANCE LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 383, 395

were read on this motion to/for DISQUALIFY COUNSEL.

Upon the foregoing documents, defendants 106-108 West 87th Street Owners, Inc. (West Street) and Cornerstone Management Systems Inc. (Cornerstone) (collectively moving defendants) move to disqualify Ron A. Hollander, Esq. (Hollander) counsel for plaintiff Gary Paul (Paul). The motion is made pursuant to New York Rules of Professional Conduct: Rule 1.6 Confidentiality of information; and Rule 1.9 Duties to former clients (22 NYCRR 1200). The moving defendants allege Hollander has a non-waivable conflict of interest and has used confidential information gained from prior representation of West Street to their detriment.

The underlying action arises from water leaking from apartment 2A directly below into plaintiff's apartment (1A), allegedly occurring on June 18, 2017 at 108 West 87th Street in the County, City and State of New York. Thereafter, plaintiff's apartment became uninhabitable causing plaintiff to seek permanent alternative living accommodations.

Summary

Plaintiff commenced this action on November 20, 2017 against West Street; and co-defendants Lawrence Davidson, Aldous Davidson and Janet Amidgi (apartment 2A defendants). On May 24, 2019, plaintiff served an amended complaint adding Cornerstone and Frank Brusco Maintenance LLC (Brusco) as additional co-defendants. Among other things, plaintiff alleges the apartment 2A defendants were negligent and reckless in renovating their apartment with disregard to the City of New York's Building Code.

Plaintiff alleges the housing cooperative West Street is liable for having failed to inspect, supervise or oversee the alterations made to apartment 2A and permitting the alterations to occur without the apartment 2A defendants properly obtaining work permits; West Street knew cooperative owners and shareholders were violating house rules and West Street failed to enforce the rules; West Street failed to perform mold testing and remediation; West Street fined plaintiff without providing sufficient explanation; and West Street is in breach of the propriety lease for refusing to restore plaintiff's apartment.

It is further alleged by plaintiff that co-defendant Cornerstone is liable for representing 23-hours a day assistance with their apartments and failing to abate the water leakage occurring to apartment 1A; acting reckless and with a conscious disregard of plaintiff's rights; Cornerstone provided false and/or misleading information to plaintiff; and knew they were responsible for repairing plaintiff's apartment after receipt of notice of the damage.

Plaintiff alleges the subject building's superintendent Brusco was inadequately trained to resolve or identify the water leakage issue, and therefore, failed to resolve the leaking situation.

Arguments

In support of their motion to disqualify counsel, moving defendants contend that during Hollander's prior legal representation of West Street from the early/mid 1990s until November 10, 2008, he was privy to confidential and privileged information (including NYC Department of Housing Preservation and Development (HPD) violations. In addition, Hollander represented West Street in a substantially similar lawsuit regarding water damage and mold remediation (*see Dole v 106-108 W. 87th St. Owners Inc. and Siren Management*, HP 6004/05 New York County Civil Court, (*Dole*) lawsuit. Moving defendants state the *Dole* action prompted West Street to hire the building inspector Rand Engineering & Architecture, P.C. (Rand) who created a report (Rand Report), which outlined the building's deficiencies and potential New York City Building Code violations. Moving defendants allege that Hollander acting as attorney for West Street was privy to the Rand Report; gave legal advice based on the review of Rand's findings which (allegedly) were subject to attorney-client privilege; West Street never waived the attorney-client privilege; and West Street did not and will not waive the conflict of interest between Hollander representing Paul and Hollander's prior representation of West Street. Therefore, Hollander is allegedly in violation of the New York Rules of Professional Responsibility Rule 1.6: Confidentiality of Information; and Rule 1.9: Duties to former clients. The moving defendants proffer an affidavit from the West Street's President Michael Laba (Laba) and can provide the Rand Report with relevant email correspondences for an *in-camera* review, should the Court choose.

In opposition to the moving defendants' motion to disqualify counsel, Hollander argues this motion is deliberately drafted for tactical purposes as it is made three years after the inception of this action with West Street knowing that Hollander was a prior attorney for them,

and the tactical advantage sought is similar to the one found in *Solow v W.R. Grace & Co.*, (83 NY2d 303, [1994]). Therefore, such a defense tactic is frivolous, financially harmful to plaintiff, and in light of the global pandemic it is unreasonably burdensome for plaintiff to obtain new counsel, especially since Hollander has been plaintiff's business attorney for the past 20 years.

Hollander further avers the professional rules of responsibility have not been violated as the prior legal services are not substantially related to the instant action. Moreover, Hollander's representation in prior matters does not materially advance plaintiff's position in the current suit and it does not involve the same information. Likewise, there is no evidence that disclosure made nine years ago has any relevance to the current dispute and disqualification should not occur since opposing counsel represents both West Street and Cornerstone (both of which may have differing interests).

It is further argued by Hollander that the allegedly privileged or confidential information was already in Paul's possession and obtained while Paul was acting as a prior board member and president of the cooperative. In addition, Hollander believes the information involved is generally known and would be available to lawyers who might have represented plaintiff directly. Furthermore, Hollander maintains Laba's affidavit does not present any specific confidential information nor do the moving papers explain how the information can be confidential if plaintiff was privy to such information prior to the commencement of this suit; therefore, arguing the information cannot be claimed as confidential or privileged.

Likewise, Hollander states he was not privy to defendant's conduct/actions for the last nine years as representation ceased. As such, he maintains that there are no confidences or secrets of West Street that are being used in connection with this suit. As the moving papers do not explain what is allegedly confidential or information that may be utilized by plaintiff,

Hollander contends that these conclusory assertions do not suffice to support disqualification, and therefore, the moving papers fail to particularize the alleged confidences warranting disqualification.

Additionally, Hollander contends he was not involved in the creation of the Rand Report; and he believes the Rand Report was not prepared to examine health and safety issues within the cooperative.

It is further argued by Hollander that Laba is not a party to the litigation so his “personal and confidential information” is not relevant for determining whether Hollander should be disqualified. In any event, Hollander maintains he was not privy to any personal information of Laba. In addition, Hollander directs the Court to prior shareholder and board member of West Street Drew Krasny’s (Krasny) affidavit and accompanying exhibit demonstrating Laba’s statements in his affidavit are either false or just forgetful as Laba stated that Hollander was privy to confidential information during cooperative board meetings.

Finally, Hollander argues a party’s right to be represented by the counsel of his choice is a valued right. Additionally, Hollander believes the law does not require defendants to have moved for disqualification only when a conflict of interest would negatively impact the movant’s interests. Likewise, counsel argues this Court should not consider the possibility of Hollander being called as a witness to testify as a basis for disqualification even if it has not been raised by West Street. Moreover, Hollander contends that the Court must consider the totality of the circumstances and carefully balance the rights of the parties. Because West Street fails to present evidence how the information is confidential; how disclosure would be harmful; the moving papers fail to show that there exists a reasonable probability that the rules of professional

responsibility have been violated; and generalized allegations are insufficient to justify disqualification over this matter, Hollander argues the motion must be denied.

Plaintiff cross-moves under CPLR §3124 to compel moving defendants to appear for their depositions or in the alternative strike their answers. As a preliminary matter, plaintiff's cross-motion is moot in lieu of the Court already having ordered discovery to proceed.

Discussion

Local Rule 14(b) states motion papers shall not exceed 30 pages unless granted advance permission by the Court. Likewise, Rule 14(c) does not grant attorneys the right to file sur-reply papers; therefore, the Court will not consider materials presented in violation of the local rule (*see* Uniform Rules of the Justices, New York County, Civil Branch).¹

“The decision whether to grant a motion to disqualify rests in the discretion of the motion court” (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016], *affd.*, 31 NY3d 1002 [2018]). “A movant seeking disqualification of an opponent's counsel bears a heavy burden” (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 5 [1st Dept 2015]). “The right to counsel is a valued right [and] any restrictions must be carefully scrutinized” (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70 [1st Dept 2013] [internal citation and quotation marks omitted]). When there are “doubts as to the existence of a conflict of interest [they] must be resolved in favor of disqualification” (*In re Strasser*, 129 AD3d 457, 458 [1st Dept 2015])

When seeking to disqualify an opposing party's attorney or law firm, “[t]he party seeking to disqualify [...] bears the burden to show sufficient proof to warrant such a determination” (*Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692, 693 [2d Dept 2013]). The movant “must

¹ https://www.nycourts.gov/legacypdfs/courts/1jd/supctmanh/Rules/Uniform_Rules.pdf

prove: (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” (*Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123, 131-32 [1996] [“Only where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise”]); see *Solow v W.R. Grace & Co.*, 83 NY2d 303 [1994]). “Courts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation” (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]). Because of this concern, “courts should avoid mechanical application of the [...] three pivotal inquiries [cited in *Solow*, (83 NY2d 303), and conduct a] careful appraisal of the interests involved” (*Tekni-Plex, Inc.*, at 132).

Where the movant knew or ought to have known of the alleged conflict of interest for an extended period of time and moves for disqualification during the midst of litigation, the Court can infer that “the motion was made merely to secure a tactical advantage,” and the movant “may be found to have waived any objection to the other party’s representation” (*Hele Asset, LLC* at 694). When a movant “seeks to disqualify its adversary’s counsel in the context of ongoing litigation, courts consider when the challenged interests became materially adverse to determine if the party could have moved at an earlier time” (*Id.*, at 693-94; see *In re Estate of Peters*, 124 AD3d 1266, 1268 [4th Dept 2015]).

1. Existence of an Attorney-Client Relationship

Here, Laba’s affidavit and Hollander’s admission that he was in a prior attorney-client relationship with West Street satisfies the first prong.

2. Matters Involved in Both Representations are Substantially Related, and the Interests of the Present Client and Former Client are Materially Adverse

Here, Laba says the *Dole* matter is substantially similar to the Paul lawsuit. Upon finding the *Dole* matter on Westlaw/Lexis, a denied order for contempt appears, whereby, Pamela Dole (Ms. Dole) brought suit against West Street alleging a “hazardous mold condition within her apartment, which she also alleges made her so sick that she had to vacate the premises” (*Dole v 106-108 W. 87th St. Owners Inc., et al*, 13 Misc 3d 1241[A] [Civ Ct, NY County 2006]). In addition, there were allegations of HPD and the New York City Department of Health and Mental Hygiene (DOH) violations, with what appears to be more violations and focus pertaining to the DOH’s regulations. The facts of that prior case including an expert’s opinion showed that “water from the exterior of the building [was] responsible for the mold that contaminated the insulation and the sheetrock” and there was “elevated levels of mold” requiring remediation (*Id* at 6).² Furthermore, the denied order cites Paul as the President of West Street during the *Dole* matter. In the contempt order, no reference is made to the Rand Report, but instead an environmental consulting firm and their report inspecting for mold.

In the present matter, Paul is: (1) suing tenants for negligence and/or recklessness in renovating their apartment and water leakage from their toilet; (2) suing West Street for failing to inspect, supervise or oversee apartment alterations without ensuring the alterations are done with work permits and for failing to perform mold testing and remediation; and (3) suing other defendants for other matters.

² In Ms. Dole’s order to show cause for contempt against West Street and other defendants (collectively respondents), she alleged that the respondents had failed to: remove molded sheetrock, replace soundproofing behind sheetrock, inspect for mold or sources of water penetration, use proper safeguards to protect premises and personal property, and remediate and repair mold conditions.

Here, the only conceivably related issue between both matters are allegations related to failure to perform mold testing and remediation; however, this does not seem to rise to the level of being substantially related when it is only a fraction of what Paul is allegedly suing for. In addition, it is not clear how the Rand Report was utilized in or after the *Dole* matter or how the Rand Report is substantially related when Hollander states he “was not involved in the content, editing or writing of [the Rand] report or the previous project for which Rand was engaged” [sic] (NYSCEF Doc. No. 238, p. 13).

In arguendo, even if the second prong was met, it was apparent that the interests of both clients were materially adverse from the inception of the lawsuit (*see In re Estate of Peters* at 1270 [respondent participated in lawsuit for over one year with full knowledge of the identify of who the petitioner’s attorney was and the potential conflict of interest involving that attorney]). Moving defendants in this matter knew Hollander was their prior attorney from nearly a decade before this motion and they were aware of Hollander’s knowledge from that prior representation.

Additionally, even if this Court found disqualification was warranted, Paul was the President in the *Dole* matter and was privy to all information relating to the *Dole* lawsuit and the Rand Report (*Contra Greene v Greene*, (47 NY2d 447, 453 [1979] [“To obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice”]). Even if the Court were to find the information as confidential, what information Hollander knows, Paul would know too, which would defeat the intended purpose for a motion to disqualify, given that Paul would be able to share what he already knows with incoming counsel (*see Tekni-Plex, Inc.*, at 132 [“courts should avoid mechanical application of the [...] three pivotal inquires” when they are “made for tactical purposes”]).

Conclusion

Because moving defendants did not meet their burden under the second and third prongs, the Court finds "there is no real concern that a confidence has been abused" (In re Estate of Peters at 1270). In addition, with consideration to the hardship that would be inflicted on plaintiff and the nearly three-year delay in bringing the motion, this Court concludes that this application was brought for the purposes of securing a tactical advantage, which does not warrant disqualification (see Id at 1270). Therefore, West Street is deemed to have waived any conflict of interest.

Accordingly, it is hereby

ORDERED that the motion is denied in its entirety; and it is

ORDERED that plaintiff's cross-motion is moot in lieu of the Court having already ordered that discovery shall proceed.

This constitutes the decision and order of the Court.

2/26/2021

DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE