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

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I & S INVESTMENTS, LLC,

Plaintiff, Decision and order

- against - Index No. 524015/2020

DAVID and TSIRL SILBERSTEIN,

Defendants, December 16, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to substitute DRPS Management LLC the assignee of the plaintiff. Further, the defendants have moved seeking to disqualify plaintiff's counsel. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determinations.

As recorded in a prior order, on March 9, 2018, defendants executed a promissory note with plaintiff for a principal amount of $5,000,000 together with interest as defined in the note. The maturity date under the note was March 9, 2019, one year after the note was executed. The plaintiff alleges that after defendants ceased to make any payments after September 9, 2019, the parties entered into a forbearance agreement on November 14, 2019. Under that agreement, plaintiff deferred collecting interest until July 1, 2020, in exchange for an additional $1,000,000 from defendants. Additionally, under the forbearance agreement, plaintiff is entitled to certain interests in other entities owned by defendant David Silberstein.

On December 2, 2020, plaintiff commenced this action against defendants. As amended, the complaint asserts causes of action including breach of promissory note, breaches of contract, and promissory estoppel. The complaint alleges that defendants owe plaintiff $5,957,784.42 plus 20% annualized interest from December 1, 2020, under the note. The complaint further alleges that defendants never paid the $1,000,000 under the forbearance agreement, and that defendants did not convey the required interests under the forbearance agreement. The above noted motions have now been filed.

Conclusions of Law

The defendants argue there can be no substitution because defendant David Silberstein never consented to the assignment. Pursuant to the assignment agreement, I&S assigned "(i) all ongoing litigation between I&S and David Silberstein and persons and entities affiliated with David Silberstein, including the Litigation and all claims asserted by I&S against David Silberstein and persons and persons and entities affiliated with David Silberstein in the Litigation; (ii) the Note; and (iii) all of I&S's interests in entities affiliated with David Silberstein and Coal Capital Management, LLC (collectively, the 'Interests')" (see, Assignment Agreement). The very next paragraph of the assignment agreement further provides that the

interests I&S may assign concern "ownership of and interest in the Litigation, the Note and the Interests, together with any rights to any damages or other sums received as a result of the Litigation, the Note and/or the Interests (whether through judgment, settlement or otherwise), and further directs that DRPS shall be substituted for I&S in any litigation previously commenced by I&S in connection with David and Tsirl Silberstein or persons or entities affiliated therewith, and/or the Note or the Interests, including, without limitation, the Litigation have in entities affiliated with Mr. Silberstein or with Coal Capital Management" (id). Thus, I&S did not assign any rights without Mr. Silberstein's consent. Rather, the agreement merely assigned litigation interests of which Mr. Silberstein has no privity in which to object. Therefore, the motion seeking substitution is granted.

Turning to the motion seeking disqualification, it is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that such right may not be abridged without some overriding concern (Matter of Abrams, 62 NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing party's counsel must present sufficient proof supporting that determination (Schmidt v. Magnetic Head Corp., 101 AD2d 268, 476 NYS2d 151 [2d Dept., 1984]). The former client conflict of interest rule is codified

in the New York Rules of Professional Conduct, Rule 1.9 (22 NYCRR §1200.0 et. seq.). Specifically, Rule 1.9(a) provides: "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..." (id).

A party seeking disqualification of counsel under the former client conflict of interest rule must show that: "(1) there was a prior attorney client relationship; (2) the matters involved in both representations are substantially related; and (3) the present interests of the attorney's past and present clients are materially adverse" (Estate of Harris, 21 Misc3d 239, 862 NYS2d 898 [Surrogate's Court, Bronx County 2008]; see, also, Falk v. Chittenden, 11 NY3d 73, 862 NYS2d 869 [2008]; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 684 NYS2d 459 [1998]). Once the moving party demonstrates that these three elements are satisfied "an "irrebuttable presumption of disqualification arises" (Estate of Harris, supra).

The crux of the disqualification motion is that plaintiff's counsel has represented entities managed and owned by David Silberstein, known as the retreat entities and now represents an entity, namely DRPS, suing Silberstein. The defendants assert this dual representation creates a conflict which requires

disqualification of plaintiff's counsel. Plaintiff's counsel counters that they never represented Silberstein, rather, they merely represented corporate entities and even if Silberstein was a member or manager of those entities that does not mean any attorney client relationship existed. In Campbell v. McKeon, 75 AD3d 79, 905 NYS2d 589 [1st Dept., 2010] the court explained that a "lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual" (id). Thus, a corporation's counsel represents the corporation and not its individual shareholders or its employees (Eurycleia Partners LP v. Seward & Kissel LLP, 12 NY3d 553, 883 NYS2d 147 [2009]). The defendants assert that plaintiff's counsel is "now, in effect, impermissibly representing one client (DRPS) suing another of its clients (David Silberstein as manager of NRC, NRP and NRF [the retreat entities]) in this action" (see, Defendants' Memorandum of Law in Support of Cross-motion to Disqualify Counsel for DRPS, page 4). However, as demonstrated, David Silberstein was never a client of plaintiff's counsel since that representation was of corporate entities and not Silberstein himself. Further, the defendant argues that plaintiff's counsel "owes a fiduciary duty to David Silberstein, in his capacity as manager of Retreat" (see, id, at page 6). However, in Eurycleia, (supra) the court

held the opposite, noting that "S & K's representation of this limited partnership, without more, did not give rise to a fiduciary duty to the limited partners" (supra). Moreover, Steven's Distributors Inc., v. Gold, Rosenblatt & Goldstein, 2010 WL 2984352 [Supreme Court, New York County 2010], cited by plaintiff, does not demand a contrary result since that case involved partnerships whereby unlike corporations, partnerships are not considered distinct entities from the partners who compose it (see, Dembitzer v. Chera, 285 AD2d 525, 728 NYS2d 78 [2d Dept., 2001]).

Turning to the disqualification based upon the fact counsel might be a witness in this lawsuit, Rule 3.7 of the New York Rules of Professional Conduct prohibits an attorney from representing a party where it is likely the attorney will be called as a witness on behalf of the client regarding a "significant issue" (id). Thus, to disqualify counsel the party seeking such disqualification must demonstrate that the testimony of the counsel will be necessary to pursue its own claims (Arons v. Charpentier, 8 AD3d 595, 779 NYS2d 242 [2d Dept., 2004]). Alternatively, even if not strictly necessary, disqualification would be proper where the testimony of counsel would be prejudicial to his or her own client (Daniel Gale Associates, Inc., v. George, 8 AD3d 608, 779 NYS2d 573 [2d Dept., 2004]).

Thus, the crucial questions which must be addressed is whether the testimony of plaintiff's counsel is 'necessary' and even if not necessary whether such testimony will prejudice any of the defendants.

For testimony to be deemed necessary thereby requiring disqualification of counsel, it must be demonstrated that counsel is 'likely to be a witness' (Rule 3.7) and the testimony cannot be garnered from other sources, is not cumulative and is vital to prove the allegations of the case (Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 AD2d 64, 747 NYS2d 441 [1st Dept., 2002]). In this case there has been absolutely no evidence presented at all that the defendants by necessity should call any attorney of the law firm representing plaintiff to defend any of the allegations asserted against them (see, S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 NY2d 437, 515 NYS2d 735 [1987]). Indeed, the entire basis for the disqualification is the fact that Daniel Eisner of Schulte Roth and Zabel LLP, counsel for the plaintiff is also counsel for DRPS. However, that truism is not a basis for disqualification as noted. The defendants argue that "Daniel Eisner also has a long-standing prior relationship with Schorr and DRPS and SRZ also concurrently serves as counsel to DRPS. Therefore, Eisner and [sic] has personal knowledge of its circumstances, and must therefore be disqualified" (see, Defendants' Memorandum of Law in Support of

Cross-motion to Disqualify Counsel for DRPS, page 15). The defendants argue an attorney will be called to testify about "DRPS' improper motive in entering into the Letter Agreement referred to in the purported Assignment of Rights and the associated breaches of fiduciary duties and/or operating agreements and such testimony will be used to support appropriate claims and/or counterclaims against DRPS" (id., at page 14). The defendants further assert that Mr. Eisner is the "*only* person who has personal knowledge of the disputed transfers" (id., at page 15). The defendants do not explain the nature of these disputed transfers but surely the actual parties have knowledge of them. To be sure, if the defendants are correct then any attorney who prepares documents on behalf of clients could potentially be called as a witness. Of course, there is no such overarching disqualification rule. Nor can there be, since the attorney can only be called as a witness where the information cannot be gleaned from other sources. As noted, the parties themselves are fully aware of the letter agreement and anyone from DRPS or any party with any knowledge can be questioned about the motive of entering into that agreement as well as any breaches associated with the agreement which can support the defendants' counterclaims. Surely, plaintiff's counsel is not a party to this action and the testimony of counsel would be duplicative of

the testimony that can and should appropriately be secured from the parties themselves.

Therefore, the defendant's have failed to present sufficient evidence necessitating the disqualification of plaintiff's counsel. Consequently, the motion seeking to disqualify plaintiff's counsel is denied.

So ordered.

ENTER:

DATED: December 16, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC