

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

In the Matter of the Application of the Estate of
JACK STEINBERG, Petitioner and Shareholder
in BROTHERS REALTY OF N.Y., INC.,
WORLDWIDE FOREIGN AUTO PARTS, INC.,
IAJ AUTO PARTS CORP., SWIFT AUTO
PARTS III, INC. and SWIFT AUTO PARTS IV,
INC.,

INDEX No. 008472/08

MOTION DATE: March 31, 2009
Motion Sequence # 002

Petitioner,

-against-

BROTHERS REALTY OF N.Y., INC.,
WORLDWIDE FOREIGN AUTO PARTS, INC.,
IAJ AUTO PARTS CORP., SWIFT AUTO
PARTS III, INC. and SWIFT AUTO PARTS IV,
INC. as well as IRA STEINBERG, ADAM MAHL,
ROBERT LICAUSI,

Respondents.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X

This motion, by petitioner, for an order:

- A. Pursuant to 22 NYCRR §1200.27 (DR5-108), §§1200.28 (DR5-109), and CPLR §321(c) disqualifying the respondents'

attorneys, George C. Zaferiou, Esq., as well as the firm which employs him, Spizz & Cooper, LLP, on the grounds that there is a conflict of interest between such counsel and firm representing the interests of a certain respondent shareholder as well as the respondent corporations in this proceeding where such interests are conflicted with the interests of petitioner as successor to a deceased stockholder in the respondent corporations;

- B. Pursuant to 22 NYCRR §1200.27, New York Disciplinary Rule 5-102(b), since the testimony of George Zaferiou at trial may be contrary to the position asserted by respondents thereby disqualifying Mr. Zaferiou and the firm which employees him, Spizz & Cooper, LLP;
- C. That this Court confirm that the issues outlined in Paragraph 33 of the supporting affirmation of James G. Marsh were included within the order of reference previously entered by the Court; and
- D. For such other and further relief as this Court may deem just, equitable and proper,

is determined as hereinafter set forth.

FACTS AND CONTENTIONS

The petitioner is an executrix of her deceased husband's, Jack Steinberg, estate seeking relief pursuant to Business Corporation Law 1104(a). The decedent was a minority shareholder of IAJ Auto Parts Corp., Swift Auto Parts III, Inc., Swift Auto Parts IV, Inc. and Brothers Realty of N.Y., Inc. (hereinafter referred to as "Respondent Corporations"). This Court previously ordered that certain issues in the petitioner's order to show cause be determined by a court-appointed referee. At the hearing before the Referee Dana, the Court directed that a deposition of the respondents' counsel, Mr. Zaferiou, as the attorney draftsman of the subject shareholder agreements be conducted to determine if Mr. Zaferiou and his firm, Spizz and Cooper, LLP, should be disqualified. Mr. Zaferiou was deposed on January 14, 2009. Thereafter, the petitioner filed the instant motion to disqualify the respondents' counsel, and his firm, by extension.

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Mr. Zaferiou, was retained by one the respondents, Ira Steinberg, to draft the shareholder's agreements for the Respondent Corporations in which the decedent held interests. The agreement contained a buyout provision in the event of death of one shareholder and the formulas to value shares.

The parties dispute, in the instant motion, is whether or not the decedent was previously represented by Mr. Zaferiou in the course of transactions among the Respondent Corporations and the execution of the shareholder's agreement, in which case, according to the petitioner's assertion, the respondents' counsel would have conflict of interest and should be disqualified from the ongoing litigation.

The petitioner avers that Mr. Zaferiou as well as his firm which employs him should be disqualified from acting as an attorney for the respondents pursuant to DR 5- 108, DR-5 109 (a), and CPLR § 321(c) since there is a conflict of interest between the counsel and the petitioner as successor to the deceased shareholder in the Respondent Corporations. The petitioner argues that the interests of the petitioner's deceased husband were represented by Mr. Zaferiou and his firm prior to the commencement of this proceeding and involving matters which are subject to the proceeding since the decedent owned shares of the Respondent Corporations.

The petitioner further avers that DR 5-102(b) also requires that Mr. Zaferiou be disqualified because his testimony on the decedent's mental competency to execute the agreement may be contrary to the position asserted by the respondents. She alleges that Mr. Zaferiou is a necessary witness to this litigation and therefore cannot serve as counsel of the respondents.

The respondents assert that there was no attorney-client relationship between Mr. Zaferiou and the decedent since Mr. Zaferiou was an independent counsel retained only to draft the agreements for the respondents and he made clear that each shareholder should seek an independent counsel to review the agreements.

The respondents further assert that the rules on which the petitioner relies require, as a prerequisite to disqualification, that the lawyer's testimony must address a significant issue in dispute. They argue that Mr. Zaferiou's testimony will be cumulative at best on the issue of the decedent's mental capacity since the respondents will have other qualified witnesses to testify on Jack's health and the petitioner will also submit expert testimony on the same issue as well.

The respondents argue that the petitioner seeks disqualification to delay, or for a strategic advantage. The respondents argue that disqualifying the firm as attorney would

place substantial hardship on the respondents, deprive the Respondent Corporations and the respondent, Ira Steinberg, of their choice of counsel and give the petitioner a strategic advantage in this litigation.

DECISION

It is well settled law of this State that

“A party seeking disqualification of its adversary’s lawyer pursuant to DR 5-108(a)(1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only “where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise”

(Jamaica Public Service Co. Ltd. v. AIU Ins. Co. 92 NY2d 631, 684 NYS2d 459, 1998).

“It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the court (see, **Olmoz v Town of Fishkill**, 258 AD2d 447; **Fischer v Deitsch**, 168 AD2d 599; **Narel Apparel v American Utex Intl.**, 92 AD2d 913, 914). A party’s entitlement to be represented in ongoing litigation by counsel of its own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted”.

(Horn v. Municipal Information Services, Inc., 282 AD2d 712, 724 NY2d 320, 2d Dept., 2001).

The Court is not persuaded by the petitioner's assertion that the respondents' counsel has conflict of interest in this litigation and therefore should be disqualified. Although attorney-client relationship may exist without formal retainer agreement or payment of fee, the court must look to the parties' words and actions to ascertain existence of such relationship. (Moran v. Hurst, 32 AD3d 909, 822 NYS2d 564, 2d Dept., 2006).

The Court finds that Mr. Zaferiou was an attorney retained solely by the respondent, Ira Steinberg, to draft the subject agreements. The agreement was drafted in accordance with the instruction solely from the respondent. The invoice for the legal service was sent to his office. No instruction was given by the petitioner's decedent with respect to the terms of the agreements. Mr. Zaferiou made clear that the decedent should retain an independent counsel for review of the agreements. The petitioner does not offer sufficient documentary evidence that establishes the prior attorney-client relationship between Mr. Zaferiou and the decedent. Rather, it appears that the decedent and the petitioner had ample opportunities to have the agreement reviewed by an independent counsel, which they simply chose not to and waived.

The petitioner erroneously assumes, in her assertion based on DR 5-109(a), that Mr. Zaferiou and his firm represented an organization where the decedent was a constituent. The Court finds that Mr. Zaferiou and his firm represented the Respondent Corporations individually in the previous transactions, not as a whole. While it is true that the decedent was a shareholder of the Respondent Corporations, the courts in this State have consistently held that an attorney does not represent a co-shareholder simply by reason of the representation of corporation, unless she assumes such duty. (Kalish v. Lindsay, 47 AD3d 889, 850 NYS2d 599, 2d Dept., 2008). Therefore, the petitioner's argument based on DR 5-109(a) is unavailing.

With regard to the petitioner's assertion that DR 5-102, it is well established that the moving party must demonstrate, (1) testimony of the opposing counsel is necessary to the case, and (2) such testimony is or may be prejudicial to former client. (Daniel Gale Associates, Inc. v. George, 8 AD3d 608, 2d Dept., 2004). In determining whether a lawyer's testimony is necessary to a case, the court must take into account factors such as significance of the matters, weight of the testimony, and availability of other evidence. (S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 NY2d 437, 1987).

The Court is not convinced by the argument that Mr. Zaferiou's testimony with

respect to the decedent's mental competency is necessary and, therefore, that Mr. Zaferiou should be disqualified pursuant to DR 5-102. "An attorney witness whose testimony, at best, is cumulative, is not a necessary witness." (Talvy v. American Red Cross in Greater New York, 205 AD2d 143, 618 NYS2d 25, 1st Dept., 1994). As the respondents correctly point out, there are other legitimate witnesses, including the petitioner's potential expert and the decedent's family members who can testify on the decedent's mental and physical condition. Since the meeting occurred on March 1, 2006 lasted less than an hour and it was four months before the decedent actually signed the agreements, Mr. Zaferiou's testimony on the issue of decedent's capacity to enter into an agreement may be neither accurate nor dispositive.

Accordingly, given the slight weight of the testimony, and availability of other reliable sources of evidence as to the issue of competency, the Court finds that Mr. Zaferiou's testimony relates solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

On September 4, 2008, this Court, by order, unequivocally defined the scope of the issues that were to be decided on the hearing before the referee Dana. The additional issues outlined in paragraph 33 of the petitioner's affirmation are beyond limit of the scope and shall not be included.

The motion to disqualify the respondent's counsel is **denied**; the issues defined by the Court shall remain unchanged.

Dated 1 JUL 06 2009


J.S.C.

ENTERED
JUL 07 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE