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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present: HON. JOHN P. DUNNE, Justice**

**TRIAL/IAS, PART 8**

**GERALD ZUTLER**

**Index No. 654/03**

**Motion Seq. No. 1&2**

**Motion Submission: 11/5/04**

**Order to Show Cause to disqualify counsel**

**Cross-motion to dismiss Complaint**

Plaintiff(s),

- against -

**DRIVERSHIELD CORP., d/b/a  
DRIVERSHIELD.COM CORP., and  
BARRY SEIGEL, individually**

Defendant(s)

The following papers read on this motion:

Order to Show Cause and Cross-motion..... XX

Answering Affidavits .....

Reply.....X

Memos.....XX

Upon the foregoing papers, it is hereby ordered that Plaintiff's application to disqualify Thomas J. McNamara as counsel for Defendants' and Defendants' cross-motion for an Order dismissing Plaintiff's complaint are decided as follows:

Plaintiff's action is for breach of an employment contract; fraud in the inducement; and age discrimination. Defendant Corporation had hired Plaintiff as its Chief Operating Officer in April 1998, pursuant to a written employment contract. On February 5, 2002, a new three year employment contract was executed. On June 7, 2002, Plaintiff was terminated in his position as "CEO". The Plaintiff alleges that this termination was without cause and as a result of age discrimination in violation of Plaintiff's human and civil rights, (New York State Human Rights Law).

Plaintiff further argues that during the course of his tenure as CEO, Mr. McNamara acted as legal counsel for the Defendant Corporation involving incidents which is alleged formed the basis for the decision to terminate the Plaintiff from his employment. As such, Mr. McNamara would then be called as a witness, and required to withdraw as counsel pursuant to DR5-102, 22 NYCC Sec. 1200.21.

In opposition, the attorney for Defendant, Mr. McNamara, argues that he met with the Plaintiff only on one occasion. Mr. McNamara states that he represented the Defendant Corporation in two collection matters. One matter, he assigned to an Associate in his firm who handled the matter through settlement. However, Mr. McNamara does indicate he spent 2.65 hours on the matter supervising his Associate. Mr. McNamara does state he has represented Barry Siegel (Corporate Executive) for almost 15 years.

With respect to the EDS matter, Mr. McNamara indicates he spent 56.85 hours over a one year time (131 time entries). Six of these entries involve Mr. Zutler, (phone conferences and one face-to-face conference).

As part of Defendants' cross-motion to dismiss or strike Plaintiff's complaint, the Defendant argues that Plaintiff has failed to appear for depositions to be conducted by Mr. McNamara or produce requested documents.

Plaintiff has indicated that he will comply with all discovery demands upon resolution of the Plaintiff's disqualification application.

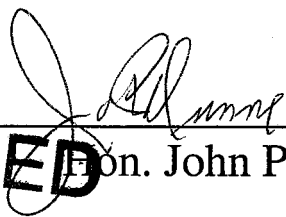
Since it is apparent to this Court, based upon the papers submitted, that testimony provided by Mr. McNamara may be prejudicial to the Plaintiff, Mr. McNamara and his law firm are disqualified from representing the Defendants in this action. (**Wensley and Partners v. Polimen**; 262 A.D.2d 554, Code of Professional Responsibility DR-5-102(B), 22 NYCRR 1200.21 (b)).

Therefore, Plaintiff's application is granted, and the matter is stayed for a period of 45 days from the date of this Order. Defendants' are directed to obtain new counsel and all sides are directed to appear before this Court on **March 5, 2004, at 10:00 A.M., for a Conference**, at which time the date and time of Plaintiff's deposition and discovery schedules will be set.

It is, so Ordered.

Dated: January 8, 2004

**ENTERED**



Hon. John P. Dunne

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COUNTY CLERK'S OFFICE