

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

JAR, LLC,

Plaintiff(s),

-against-

ORIGINAL RETURN DATE: 10/22/04
SUBMISSION DATE: 11/01/04
INDEX No.: 7099/03

MAPLEWOOD GARDENS APT. CORP.,
ALEXANDER WOLF & CO., INC., SHEREE
PEARCE, EILEEN McCAULEY, NORMA
RAZON, PETER GIBNEY and MARY SIMPSON,

MOTION SEQUENCE #3

Defendant(s).

The following papers read on this motion:

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Motion by plaintiff JAR, LLC (JAR), brought by Order to Show Cause dated October 12, 2004 [Phelan, J.], to disqualify the law firm of Wagner Davis P.C. (Wagner Davis), and any of the attorneys employed by or affiliated with it, from representing any of the defendants herein in this action and in the two actions presently pending in District Court known as JAR, LLC v. Maplewood Gardens Apt. Corp., Alexander Wolf & Co., Eileen McCauley and Norma Razon [index no. CC 0028/04] and JAR, LLC v. Maplewood Garden Apt. Corp., Alexander Wolf & Co., Inc., Eileen McCauley and Norma Razon [index no. CC 00281/04] and other ancillary relief is denied.

Plaintiff JAR, the majority shareholder in defendant Maplewood Gardens Apt. Corp. (Maplewood) commenced this action against Maplewood, a cooperative housing corporation, its Board of Directors and the managing agent for Maplewood, Alexander Wolf & Co. (Wolf), to

recover damages resulting from, *inter alia*, actions allegedly taken by Maplewood's Board of Directors in violation of Maplewood's By-laws; breach of fiduciary duty by Maplewood's Board, and by each of its individual members, and the joint failure of defendants Maplewood and Wolf to make required repairs to the buildings and pay outstanding gas bills to Keyspan in a timely manner. The cooperative consists of four buildings known as 111 South Centre Street, and 120, 124 and 130 South Park Avenue, all located in Rockville Centre, New York.

It appears from the record that defendant Maplewood's insurer has undertaken the defense of this action and that Maplewood and the individual defendants are represented by Barry Margolis, Esq. of the firm of Abrams, Garfinkel, Bergson, LLP. The insurer is responsible for the legal fees incurred in the defense of this lawsuit, subject to the deductible amount under the policy, which is the obligation of defendant Maplewood.

The defense of this action, however, is separate from representation with respect to the five counterclaims asserted by defendants Maplewood, McCauley, Razon, Gibney and Simpson (the counterclaiming defendants) against plaintiff. The counterclaiming defendants seek, *inter alia*, to compel plaintiff to place every unsold apartment on the market for sale at market prices, including available apartments that are currently occupied by non-rent regulated tenants, to abide by its obligation to repair the roofs at Maplewood's premises and to prevent plaintiff from tortiously interfering with the refinancing of the first mortgage.

In opposing plaintiff's motion to disqualify Wagner Davis, the counterclaiming defendants contend that they will be unduly prejudiced if they are not permitted to be represented by counsel of their choice on their counterclaims. Wagner Davis represents the interests of Maplewood and the individual counterclaimants (McCauley, Razon, Gibney and Simpson) who are not seeking damages in their personal capacities but solely to vindicate the rights of Maplewood on behalf of all shareholders in the corporation. The retention of Wagner Davis as Maplewood's counsel was ratified at a Board meeting held on September 23, 2004.

Plaintiff has failed to demonstrate any conflict of interest inherent in Wagner Davis' representation of defendant Maplewood. The interests of defendant Maplewood and the individual counterclaimants, in their representative capacities as shareholders of said defendant, are one and the same. The fact that two officers of plaintiff JAR are its designated representatives on Maplewood's Board of Directors, does not create, as movants contend, a conflict of interest for Wagner Davis. These individuals are not parties to the instant action and no counterclaims are asserted against them in their individual capacities. As members of Maplewood's Board, the JAR representatives owe a fiduciary duty to Maplewood. Any benefit or value which would accrue to defendant Maplewood and the counterclaimants as a result of this lawsuit would serve to enhance the value of the shares of stock in defendant corporation and thus inure to the ultimate benefit of all the individual shareholders.

It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the court. (*Campolongo v. Campolongo*, 2 AD3d 476 [2nd Dept. 2003]). A party's

entitlement to be represented in ongoing litigation by counsel of his own choosing is a valuable right which should not be abridged absent a clear showing that disqualification is warranted (*Olmoz v. Town of Fishkill*, 258 AD2d 447 [2nd Dept. 1999]), and the movant bears the burden on the motion. (*Tekni-Plex, Inc. v. Meyner & Landis*, 89 NY2d 123, 131 [1996]). Although the Code of Professional Responsibility establishes important ethical standards for attorneys, when its principles are raised in the course of litigation, the courts are required to "use our judicial process to make our own decision in the interests of justice to all concerned." (*S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]).

Code of Professional Responsibility Disciplinary Rule 5-105(a) [22 NYCRR 1200.24(A)] is the main provision governing issues of conflict between multiple clients. Under that section "[a] lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or it would be likely to involve the lawyer in representing differing interests ***." While a hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest (*Poli v. Gara*, 117 AD2d 786, 788 [2nd Dept. 1986]), mere conclusory assertions that there is a conflict of interest are insufficient to warrant a hearing. (*Giblin v. Sechzer*, 97 AD2d 833 [2nd Dept. 1983]).

Having carefully reviewed the arguments advanced in support of disqualification, there is no basis to conclude that Wagner Davis' participation in the instant action, and the two actions presently pending in District Court bearing index no. CC 0028/04 and index no. CC 00281/04, gives rise to any appearance of impropriety or conflict of interest which would warrant its disqualification. Should facts later develop which would establish such a conflict, plaintiff may, if so advised, renew its motion.

Accordingly, plaintiff's motion to disqualify the law firm of Wagner Davis from representing any of the defendants herein in the instant action, and the two District Court actions, on the grounds of conflict of interest, is denied.

Plaintiff shall reply or otherwise move with respect to the counterclaims asserted in defendants' answer within 20 days from the date of service of a copy of this order. All other relief requested by plaintiff is denied.

The parties are reminded that there is presently scheduled a compliance conference before the undersigned on January 21, 2005 at 9:30 A.M.

This decision constitutes the order of the court.

Dated: 11-23-04

ENTERED

HON THOMAS P. PHELAN

DEC 01 2004

J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE