

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 3-22-12
SUBMITTED: 5-17-12
MOTION NO.: 002-MOT D; RPC

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MICHAEL PICARELLA,

Plaintiff,

-against-

SOLFERINO & SOLFERINO, L.L.P.
Attorneys for Plaintiff
15 Roslyn Road
Mineola, New York 11501

HMA PROPERTIES, L.L.C., a Florida Limited
Liability Company; ESPERAZNA GAVILLA;
HECTOR P. GAVILLA; ALEXANDER
GAVILLA,

Defendants.

HAGNEY, QUATELA, HARGRAVES, MARI PLLC
Attorneys for Defendants
888 Veterans Memorial Highway, Suite 530
Hauppauge, New York 11788

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Upon the following papers numbered 1-18 read on this motion to disqualify plaintiff's attorney ;
Notice of Motion and supporting papers 1-18 ; Notice of Cross Motion and supporting papers ___;
Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; it is,

ORDERED that the branch of the motion (002) by the defendants is granted to the extent that the branch of the motion seeking to disqualify the plaintiff's attorney is denied; and it is further

ORDERED that the plaintiff's counsel shall serve a copy of this Order with Notice of Entry upon counsel for the defendant pursuant to CPLR 2103(b)(2) or (3) within twenty (20) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court; and it is further

ORDERED that the defendants are directed to refile the branch of the motion seeking to dismiss the complaint, or, in the alternative, to serve their answers within thirty days of service of the Notice of Entry; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on January 16, 2013, in the chambers of the undersigned.

In this action the plaintiff seeks preliminary injunction preventing the sale of certain real

estate located in Florida, the defendants now move for an order disqualifying the plaintiff's attorney, Thomas Solferino, Esq. on the grounds that Solferino previously represented the members of defendant HMA Properties, LLC, has confidential information that might be provided to the plaintiff, and may be called to testify as a witness at trial. The defendants also moves to dismiss the complaint, which was denied by this Court with leave to renew by order dated July 31, 2012. During the pendency of the motion, the property was sold.

The record reveals that as members of the defendant HMA Properties, LLC, the plaintiff holds a 35% ownership interest, defendant Hector Gavilla holds a 15% ownership interest, defendant Esperanza Gavilla holds a 35% ownership interest, and defendant Alexander Gavilla holds a 15% ownership interest. The company's only asset is a piece of property located at 430 N.E. 29 Terrace, Miami, Florida. The parties have disagreed upon whether to sell the property, and at what price, and subsequently, the property went into foreclosure. In or about November, 2011, the remaining members entered into a contract to sell the property. The gravamen of the plaintiff's complaint is that the Gavilla defendants are depriving him of his investment and interest in the company. The complaint alleges in the first cause of action that the defendants breached their fiduciary duty to the plaintiff, and seeks damages in the sum of \$200,000.00; and in the second cause of action that the operating agreement of the company allows the plaintiff to withdraw as a member and collect his distributive share pursuant to operating agreement for the company, and seeks a payout of his interests in the amount of \$200,000.00.

In support of the motion, the defendants submit, *inter alia*, the personal affidavits of Hector Gavilla and Esperanza Gavilla. Hector Gavilla avers in his affidavit dated March 6, 2012, that he is a member of the defendant and holds a 15% ownership interest in the company, whose only asset is the property in Florida. He lives in Florida. He objects to Solferino representing the plaintiff for two reasons. Solferino served as Gavilla's New York counsel in connection with the formation and operation of various real estate investments. In addition, Gavilla states that Solferino knows confidential privileged information and also could be a potential witness in his matter. Gavilla states that he met Solferino in his office multiple times to seek his counsel and advice regarding legal issues in various real estate ventures. Gavilla thinks that Solferino has a vendetta against his family. He also states that he made the same objection in a separate matter.¹

Esperanza Gavilla avers in her personal affidavit, dated March 6, 2012, that she believes Solferino knows confidential, privileged information and could be a witness in this matter. In addition, she states that Solferino gained substantial knowledge regarding her finances, especially in connection with the purchase of a condominium in Manhattan. She also believes that Solferino has a personal vendetta against her and her family. Gavilla states that her family fired Solferino for failing to timely prepare closing documents in a real estate deal, and that it seems that Solferino is eager to represent adverse parties in litigation against her.

¹ The action, captioned *Hector Gavilla and Esperanza Gavilla v Anthony Giannattasio and Janet Giannattasio*, Index No. 10-20907, wherein the motion to disqualify Solferino was denied by order dated August 10, 2012 (Mayer, J.).

The plaintiff did not serve opposition papers in anticipation of a hearing, held on Tuesday, September 25, 2012. On that date, the Court heard testimony of the parties.

“Although [a] party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged, ‘such right will not supersede a clear showing that disqualification is warranted’” (*In re Marvin Q.*, 45 AD3d 852, 853, 846 NYS2d 356 [2d Dept 2007], *quoting Campolongo v Campolongo*, 2 AD3d 476, 476, 768 NYS2d 498 [2d Dept 2003]; see *Greene v Greene*, 47 NY2d 447, 453, 418 NYS2d 379 [1979]; *Matter of Astor Rhinebeck Assoc., LLC v Town of Rhinebeck*, 85 AD3d 1160, 1161, 925 NYS2d 896 [2d Dept 2011]; *Horn v Mun. Info. Servs.*, 282 AD2d 712, 724 NYS2d 320 [2d Dept 2001]). “The ‘disqualification of an attorney is a matter which rests within the sound discretion of the court and will not be overturned absent a showing of abuse’” (*Wells Fargo Bank, N.A., as Trustee, Respondent, v Caro*, 82 AD3d 880, 920 NYS2d 90 [2d Dept 2011], *quoting Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 277, 476 NYS2d 151 [2d Dept 1984]; see *A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 736, 736, 823 NYS2d 433 [2d Dept 2006]; *Calandriello v Calandriello*, 32 AD3d 450, 451, 819 NYS2d 569 [2d Dept 2006]).

“[A] party seeking disqualification of its adversary’s lawyer or a law firm on the ground of prior representation must 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 & Landis*, 89 NY2d 123, 131, 651 NYS2d 954 [1996]; see Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.9 [a]; *Falk v Chittenden*, 11 NY3d 73, 78, 862 NYS2d 839 [2008]; *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636, 684 NYS2d 459 [1998]). The moving party bears the burden of satisfying all three criteria in order to give rise to a presumption of disqualification of opposing counsel (see *Tekni-Plex, Inc. v Mehner & Landis*, *supra* at 131).

Rule 1.9 (a) of the New York Rules of Professional Conduct provides:

A lawyer who has formerly represented a client in a matter should not thereafter represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interest of the former client unless the former client gives informed consent, confirmed in writing.

Rule 3.7 (a) of the New York Rules of Professional Conduct provides:

A lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. Unless: (1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal.

Here, the defendants have failed to meet their burden of proving that disqualification

would be appropriate under the circumstances presented. Although Solferino represented the defendants and it is true that the interests of the plaintiff and the defendants are adverse, the defendants failed to establish a substantial relationship between the current and prior representations. Contrary to their contentions, any representation of the Gavilla defendants in connection with prior real estate closings are unrelated to the present dispute, which is the sale and distribution of the company assets. The defendants have failed to specify facts which lead to a determination that there is a nexus between the subject action and prior real estate dealings in the past (**Hunkins v Lake Plaid Vacation Corp.**, 120 AD2d 199, 201). Moreover, the Gavilla defendants have failed to identify any specific confidential information imparted to Solferino that may disclosed in this action (**Jamaica Pub. Serv. Co. v AIU Ins. Co.**, *supra* at 638). Accordingly, the motion is denied.

In addition, the defendants have failed to demonstrate that disqualification is required on the ground that Solferino would be required to testify. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary (**J. P. Foley & Co. v Vanderbilt**, 523 F2d 1357, 1359 [2d Cir. N.Y. 1975]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence (see **Universal Athletic Sales Co. v American Gym, Recreational & Athletic Equip. Corp.**, 546 F2d 530, 538-539 [1976], *cert denied* 430 U.S. 984 [1977]; **Foster Wheeler Corp. v Babcock & Wilcox Co.**, 440 F Supp 897, 903 [S.D.N.Y. 1977]).

Taking these factors and the testimony of the parties into consideration, the court finds that the defendants have failed to sustain their burden of demonstrating that the testimony of the plaintiff's counsel will be necessary.

Accordingly, that branch of the motion to disqualify Mr. Solferino is denied. With regard to the branch of the motion which was seeking dismissal of the complaint, the defendants are directed to refile their motion, or, in the alternative, to serve their answers within thirty days of service of a notice of entry of this determination.

Dated: September 28, 2012

HON. ELIZABETH HAZLITT EMERSON

J.S.C.