Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision

***PRESENT*:**
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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ROBERT T. CITRANGOLA, SR., individually, and ROBERT T. CITRANGOLA, SR., derivatively on behalf of ALL SEASON RESTORATION, INC.,

Plaintiffs,

-against-

ROBERT E. CITRANGOLA, JR.,

Defendant.

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INDEX NO.: 202661/2022
MOT. SEQ. NO.: 001 – DECIDED
002 - MG

FARRELL FRITZ, P.C.
Attorneys for the Plaintiffs
400 RXR Plaza
Uniondale, NY 11556

COLE SCHOTZ, P.C.
Attorneys for the Defendant
1325 Avenue of the Americas,
Suite 1900
New York, NY 10019

The Defendant, Robert E. Citrangola, Jr. ("Defendant", "Robert Jr.") requests an Order: 1) pursuant to **CPLR 7503** compelling arbitration of the action; 2) staying the proceedings as to the Complaint; and 3) awarding attorneys' fees costs and expenses related to the motion.

The Plaintiff, Robert T. Citrangola, Sr. individually, and derivatively on behalf of All Season Restoration, Inc. ("Robert Sr.", "Plaintiff") by cross-motion requests an Order pursuant to **22 NYCRR §1200.0 Rules 1.9, 1.10, 3.7**, disqualifying Cole Schotz, P.C. from representing the Defendant in this action.

Robert Sr. has moved for identical relief in the prior related case, **Robert T. Citrangola, Jr. v. Robert E. Citrangola, Sr.**, Index No. 613502/2022.

This is a matter concerning the ownership of the domestic corporation All Season Restoration, Inc. ("All Season"). All Season is a franchisee of Servpro Industries LLC; whose commercial services include water, fire and mold remediation. On August 8th, 2017, the Plaintiff, Robert Sr. and his son, Defendant, Robert Jr., (together the "Parties"), executed a Stockholders Agreement ("2017 Agreement") concerning All Season; drawn by its attorney, Cole Schotz, P.C. (Doc. 8). The Complaint alleges fraud and misappropriation of corporate funds and breach of fiduciary duties; derivatively on behalf of All Season: faithless servant, usurpation of corporate opportunity and accounting; and directly on behalf of Robert Jr.: breach of the Equal Distribution Agreement and breach of the Stock Purchase Agreement. The complaint demands the termination of Robert Jr. from All Season; and an order compelling him to sell his interest in All Season to Robert Sr.

The Defendant has filed a motion (seq. no. 001) requesting an Order, pursuant to **CPLR 7503** compelling arbitration of the instant action pursuant to the terms of Paragraph 16.12 of the 2017 Agreement. That paragraph states in part:

> "Any controversy or claim arising out of or relating to this Agreement or any breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association…and may not be appealed to any court."

The Court notes that the parties are sophisticated businesspersons who had access to legal counsel regarding the execution of their 2017 Agreement. Neither has alleged duress or undue influence with regard its creation, review or execution. It is well-settled

law that "the contract documents speak for themselves" (***Weg v. Kaufman***, 159 AD3d 774, 776, 72 NYS2d 135 [2d Dept 2018]). The execution of the agreement triggers a presumption that the signors understood its contents and consent to its terms (***Prompt Mort. Providers of North America, LLC v. Zarour***, 155 AD3d 912, 914, 64 NYS3d 106 [2d Dept 2017]). Whether or not a contract provision is ambiguous is a question of law to be resolved by the Court (***Falanga v. Hillabrant***, 208 AD3d 1308, 1311, 176 NYS3d 88 [2d Dept 2022]). The Court finds the language of Paragraph 16.12 to be unambiguous (*see* ***Vermont Teddy Bear Co. v. 538 Madison Realty***, 1 NY3d 470, 475, 775 NYS2d 765, 807 NE2d 874 [2004]).

The Plaintiff in opposition argues that the amended complaint, supersedes the complaint against which the Defendant filed its instant motion, rendering the motion "academic" (Doc. 23, Legal Memorandum, p. 17). Counsel avers that the amended complaint contains only non-arbitrable claims; and is not subject the requirements of Paragraph 16.12 (Doc. 14).

The unambiguous language of that paragraph does not limit its application to "arbitrable claims" nor does the 2017 Agreement define that term.

The Court must consider whether filing the amended complaint without leave (**CPLR 3025 [a]**) was proper.

The record contains an affidavit of service noting that service of process of the summons and complaint (Doc. 1) upon the Defendant was completed on October 25th, 2022 (Doc. 3). The amended complaint is dated January 3rd, 2023 and filed January 4th, 2023 (Doc. 14). The time within which the Plaintiff may amend without leave had expired

(**CPLR 3025 [a]**). Plaintiff's counsel did not request leave of the Court to amend its complaint; nor does the record contain a stipulation of all parties consenting to the amendment (**CPLR 3025 [b]**).

The Plaintiff next alleges that the Defendant having filed a "motion to dismiss" extended Plaintiff's time to amend its complaint as of right; citing to ***Johnson v. Spence***, 286 AD2d 481, 483, 730 NYS2d 334 (2d Dept 2001) in support. In the case at bar, the Defendant has moved to compel arbitration (**CPLR 7503**); not to dismiss the complaint (**CPLR 3211**).

The Plaintiff also argues that the service of the motion constitutes a "responsive pleading" to the Complaint; citing to ***Plaza PH2001 LLC v. Plaza Residential Owner LP***, 98 AD3d 89, 98, 947 NYS2d 498 (1st Dept 2012). The Plaintiff contends that service of the motion to arbitrate extended the Plaintiff's time to amend as of right to twenty (20) days after November 21st, 2022. The record indicates that the amended complaint was filed on January 4th, 2023; forty-two (42) days beyond that date. The amended complaint is not compliant with statutory requirements and will not be considered by the Court.

The case must proceed to arbitration. The request for a stay of the instant action is moot. Defendant's counsel has not submitted a bill of costs nor affirmation in support of its application for attorneys' fees and costs associated with this motion. The request cannot be determined on the papers presented. Consideration of that relief is referred to arbitration.

Before releasing the case to arbitration, the Court will address the Plaintiff's cross-motion (seq. no. 002).

Plaintiff requests, pursuant to **22 NYCRR §1200, Rules 1.9, 1.10. 3.7**, the disqualification of Cole Schotz, P.C. from serving as counsel of record for Robert Jr. because that firm has also represented All Season Restoration and Robert Sr.

If disqualification is warranted, it may apply to the entire firm. Assertions by Cole Schotz P.C. of having erected an ethical wall or screen is insufficient unless it is demonstrated that the information possessed by the disqualified attorney is unlikely to be significant or material (*see* ***Solow v. W.R. Grace & Co.***, 83 NY2d 303, 601 NYS2d 128, 632 NE2d 437 [1994]; ***Kassis v. Teacher's Ins. And Annuity Ass'n***, 93 NY2d 611, 695 NYS2d 515, 717 NE2d 674 [1999]).

Defendant' counsel asserts that Cole Schotz P.C. have "completely walled off" Jonathan Goodelman, Esq. from participating in this litigation which was commenced during 2022 (Doc. 30, p. 18). It is uncontroverted that Attorney Goodelman has been the primary attorney concerned with All Season Restoration, Inc., Robert Sr. and Robert Jr. The Plaintiff alleges that, "since 2017 Cole Schotz has repeatedly, and often simultaneously, represented me, my son, and our corporation [All Season] in a variety of legal matters" (Robert Sr. Affidavit, Doc. 19, para. 4). The Plaintiff alleges that Cole Schotz P.C. provided legal representation concerning personal estate planning, disposition of his corporation stock, the 2017 conveyance of a 51% interest in All Season to the Defendant, the 2017 negotiation and drafting of the corporate Stockholders Agreement and the 2022 conveyance to the Defendant of a 49% interest in All Season, among others (para. 9). The Plaintiff states that "for all intents and purposes, Cole Schotz functioned as All Season's general counsel" (para. 52).

Attorney disqualification is a matter which may not be heard by an arbitrator due to public policy considerations, and has been placed beyond the reach of an arbitrator's discretion (*see* ***Matter of Associated Teachers of Huntington v. Board of Educ.***, 33 NY2d 229, 235, 351 NYS2d 670, 306 NE2d 791 [1973]; ***Glauber v. Glauber***, 192 AD2d 94, 97, 600 NYS2d 740 [2d Dept 1993]; ***Biedermann Indus. Licensing v. Avmar N.V.***, 173 AD2d 401, 401, 570 NYS2d 33 [1st Dept 1991]). Whether to disqualify an attorney is a matter within the discretion of the Court (***Matter of LoPresti v. David***, 179 AD3d 1067, 1068, 118 NYS3d 635 [2d Dept 2020]; ***Matter of Madris v. Oliviera***, 97 AD3d 823, 825, 949 NYS2d 696 [2d Dept 2012]).

It is well-settled law that a party's entitlement to be represented by counsel of his or her choice is a fundamental right. Disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights. Any restrictions must be carefully scrutinized (***Valencia v. Ripley***, 128 AD3d 711, 9 NYS3d 112 [2d Dept 2015]). Disqualification is to be used as a shield, and not as a sword to prejudice an opposing party from obtaining eminent counsel (***Bauerle v. Bauerle***, 161 Misc2d 673, 615 NYS2d 954 [Sup Ct Erie County 1994], *aff'd.* 206 AD2d 937, 616 NYS2d 275 [4th Dept 1994]).

There must be a clear evidentiary showing to justify the disqualification of counsel (***148 South Emerson Partners, LLC v. 148 South Emerson Associates, LLC***, 157 AD3d 889, 891, 69 NYS3d 868 [2d Dept 2018]; *see* ***S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp.***, 69 NY2d 437, 443, 515 NYS2d 735, 508 NE2d 647 [1987]). Attorney disqualification requires a "clear and convincing" standard of proof (***Kramer v. Meridian***

Capital Group, LLC, 201 AD3d 909, 162 NYS3d 400 [2d Dept 2022]). The Plaintiff bears the burden to show sufficient proof to warrant disqualification (***Koumantaros v. Hephaistos Developing, LLC***, 203 AD3d 907, 161 NYS3d 797, 799 [2d Dept 2022]).

The Court, in addition to applying a higher standard of proof than "preponderance of the evidence" to the evidence submitted, must also consider whether the cross-motion has been made for an improper reason; such as to inflict hardship upon the Defendant (***Strongback Corp. v. N.E.D. Cambridge Ave. Development Corp.***, 32 AD3d 793, 794, 823 NYS2d 357 [1st Dept 2006]).

The Plaintiff must offer sufficient evidence of three (3) criteria: 1) the existence of a prior attorney-client relationship between himself 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 (***Deerin v. Ocean Rich Foods, LLC***, 158 AD3d 603, 607-08, 71 NYS3d 123 [2d Dept 2018]). The Plaintiff has made cogent argument in support of all three. It has not been demonstrated that the cross-motion lacks a legitimate basis.

The Plaintiff has cited to three (3) Rules of the New York Rules of Professional Conduct in support of the cross-motion: **Rule 1.9** Duties to Former Clients; **1.10** Imputation of Conflicts of Interest; and **3.7** the Witness Advocate Rule. The Rules of Professional Conduct, **22 NYCRR §1200.0** are designed to provide guidance to attorneys and to provide a structure for regulating conduct. They are not binding authority for the Court in determining whether a party should be disqualified during litigation (***Falk v. Gallo***, 73 AD3d 685, 686, 901 NYS2d 99 [2d Dept 2010]).

The Court will first address the provisions of **Rule 1.9 Duties to Former Clients**. That Rule provides a *per se* standard for the disqualification of a former attorney.

The Plaintiff has arguably satisfied the three (3) elements: 1) the existence of a prior attorney-client relationship; 2) that the matters involved in the prior and present representations are substantially related; and 3) that the interests of the present client, Robert Jr. and the former client, Robert Sr. are materially adverse (***Falk v. Chittenden***, 11 NY3d 73, 862 NYS2d 839, 893 NE2d 116 [2008]; ***Strongback***, *supra.* at 794).

The Court will next address the provisions of **Rule 1.10 Imputation of Conflicts of Interest**. That Rule, which provides for a more nuanced, imputed assessment of disqualification, may be rebutted after a fact-finding hearing or upon proof of the relevant aspects of the former and present client relationships. The Rule provides for a firm to continue representation of a client where an ethical screen is enforced between the attorney who possesses client confidences and other members of the law firm. That exception requires the written, informed consent of each affected client or former client.

Robert Sr. admits to having signed a release indemnifying Cole Schotz P.C. for its representation (Conflict Waiver, Doc. 20, Exhibit 10). He denies that Cole Schotz P.C. requested his consent to represent Robert Jr. "personally, in any matters adverse to me, such as this litigation…" (Doc. 19, para. 63).

Cole Schotz P.C. has not filed any documents which demonstrate that any information acquired by Jonathan Goodelman, Esq. is unlikely to be significant or material in the litigation (***Kassis v. Teacher's Ins. and Annuity Ass'n***, 93 NY2d 611, 617, 695 NYS2d 515, 717 NE2d 674 [1999]; ***Moray v. UFS Industries, Inc.***, 156 AD3d 781, 782-

783, 67 NYS3d 256 [2d Dept 2017]; *see* ***Essex Equity Holdings USA, LLC v. Lehman Bros., Inc.***, 29 Misc3d 371, 909 NYS2d 285 [Sup Ct New York County 2010]).

Where a law firm has not demonstrated such proof and has not shown that the attorney in question does not possess knowledge likely to be significant or material in the litigation, taking steps to erect an ethical screen is immaterial (***ACP 140 West End Ave. Associates, LP v. Kelleher***, 1 Misc3d 909[A], 781 NYS2d 622, 2003 WL 23191099 [Civil Ct City of New York 2003]).

The Court will last consider **Rule 3.7 (a)**, the Witness Advocate Rule. The Plaintiff argues for disqualification because he intends to call Attorney Goodelman as a material witness.

An *intent* to call an attorney as a witness is not dispositive of whether the attorney *should* be called (***Burdett Radiology Consultants v. Samaritan Hosp.***, 158 AD2d 132, 134, 557 NYS2d 988 [3d Dept 1990]).

Disqualification of a lawyer under **Rule 3.7** is only warranted where the lawyer-witness will advocate at trial. It does not bar an attorney from pre-trial representation (*see* ***Empire Medical Services of Long Island, P.C. v. Sharma***, 189 AD3d 1176, 1178, 134 NYS3d 225 [2d Dept 2020]).

In order to prevail, the Plaintiff must demonstrate that the testimony of Attorney Goodelman is necessary to his case, prejudicial to the Defendant, and that the integrity of the judicial system will suffer should counsel not testify (***Lombardi v. Lombardi***, 164 AD3d 665, 667, 83 NYS3d 232 [2d Dept 2018]; ***Uribe Bros. Corp. v. 1840 Wash. Ave. Corp.***, 26 Misc3d 1235(a), *3, 907 NYS2d 441 [Sup Ct Bronx County 2010]). The Plaintiff

bears the burden of demonstrating "specifically how and as to what issues in the case the prejudice may occur" and that the "likelihood of prejudice to the witness-advocate's client is substantial" (***Murray v. Metropolitan Life Ins. Co.***, 583 F.3d 173, 178 [2d Cir 2009]). The Plaintiff has not, at this point sufficiently demonstrated that Attorney Goodelman will be called to testify.

When a movant seeks disqualification of the other party's attorney, the other party, at a minimum, should be afforded a reasonable opportunity to be heard on the issue of disqualification (***Doody v. Gottshall***, 67 AD3d 1347, 891 NYS2d 216 [4th Dept 2009]). "A hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest [***Olmoz v. Town of Fishkill***, 258 AD2d 447, 448, 684 NYS2d 611 (2d Dept 1999)]." (***Legacy Builders/Developers Corp. v. Hollis Care Group, Inc.***, 162 AD3d 649, 80 NYS3d 59 [2d Dept 2018]).

Plaintiff's counsel argues against the necessity of an evidentiary hearing. Counsel alleges that a "bright line rule" exists which requires disqualification under the facts presented (Reply memorandum, Doc. 47). Counsel cites two (2) cases in support: ***Morris v. Morris***, 306 AD2d 449, 763 NYS2d 622 [2d Dept 2003]; and ***Deerin***, *supra.*, 158 AD3d 603, 71 NYS3d 123 [2d Dept 2018]).

In ***Morris***, the parties each held ownership interest in a corporation. The plaintiff alleged that the defendant had improperly diverted corporate assets. The court disqualified the defendant's attorney who had also been counsel to the corporation in connection with transactions at issue (***Id.*** at 452). The court found that the defendant's interests were adverse to the corporation and the interests of the other shareholders. The court quoted

Matter of Greenberg, 206 AD2d 963, 976, 614 NYS2d 825 [4th Dept 1994]: "One who has served as attorney for a corporation may not represent an individual shareholder in a case in which his interests are adverse to other shareholders." (***Id.***).

In ***Deerin***, the parties were members of an LLC. At issue was the payment of proceeds of a "key man" insurance policy upon the death of a member. Counsel for the surviving member had also served as counsel for the LLC. The court found that

> "Since the defendants' counsel was 'in a position to receive relevant confidences' from the decedent, whose estate's interests 'are now adverse to the defendants' interests', the Supreme Court should have granted that branch of the plaintiff's cross motion which was to disqualify the defendants' counsel" (***Id.*** at 608; *quoting* ***Gordon v. Ifeanyichukwu Chuba Orakwue Obiakor***, 177 AD3d 683, 683, 985 NYS2d 279 [2d Dept 2014]).

Counsel cites, in further support, ***Poretsky v. Bartelby and Sage, Inc.***, 203 AD3d 523, 161 NYS3d 760 (1st Dept 2022). In that case, the court disqualified the defendant's counsel. The court determined that it was undisputed that the attorney had previously represented the corporate defendants and the majority shareholder. The court stated: "In view of our disposition of this issue, we need not reach the parties' arguments with respect to whether [the disqualified attorney] was a necessary witness" (***Id.***).

It is well-settled law that any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety (***Gjoni v. Swan Club, Inc.***, 134 AD3d 896, 897, 21 NYS3d 341 [2d Dept 2015]; ***Deerin***, *supra.* at 607-608).

In the case at bar, the interests of the Plaintiff are diverse to those of the Defendant. It is undisputed that the Defendant's attorneys, Cole Schotz P.C., have represented the Plaintiff, Robert Sr., All Season and the Defendant, Robert Jr., prior to the filing of the instant action. Upon careful appraisal of the interests involved, the Court finds sufficient cause to disqualify Cole Schotz, P.C. from serving as legal counsel to Robert Jr. in this litigation (*see* ***Gabel v. Gabel***, 101 AD3d 676, 676-677, 955 NYS2d 171 [2d Dept 2012]; *quoting* ***Tekni-Plex, Inc. v. Meyner & Landis***, 89 NY2d 123, 131, 651 NYS2d 954, 674 NE2d 663 [1996]).

Accordingly, it is

ORDERED, that the motion (seq. no. 001) by the Defendant, Robert E. Citrangola, Jr., which requests, pursuant to **CPLR 7503** that this matter be directed to arbitration, is granted; and it is further

ORDERED, that the request for a stay of this action as to the complaint, is denied; and it is further

ORDERED, that the request for attorneys' fees, costs and expenses related to this motion, is denied without prejudice; and it is further

ORDERED, that the cross-motion (seq. no. 002) by the Plaintiff, Robert T. Citrangola, Sr., individually and derivatively on behalf of All Season Restoration, Inc., which requests pursuant to **22 NYCRR §1200.0, Rules 1.9, 1.10, 3.7** the disqualification of Cole Schotz, P.C. from representing Robert E. Citrangola, Jr. in this action is granted; and it is further

ORDERED, that this matter is stayed for a period of Forty-five (45) days from the date of this Decision to facilitate Robert E. Citrangola, Jr. retaining new counsel.

This memorandum also constitutes the Order of the Court.

Dated: April 6th, 2023
Riverhead, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court