STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

BONN, DIOGUARDI & RAY, LLP, f/k/a
BONN, SHORTSLEEVE & RAY, LLP,
KENNETH BONN, JR., MICHAEL S. RAY,
and JOSEPH P. DIOGUARDI, JR.,

Plaintiff,

v.

THOMASYORK, LLP
THOMASYORK , LLP, d/b/a
TYS, LLP, CHRISTOPHER YORK and
GLEN A. THOMAS,

Defendants.

DECISION AND ORDER

Index #2010/15130

This is a motion to disqualify the law firm of Harris Chesworth from representing plaintiff. The motion is brought on behalf of the named defendants. These defendants contend that disqualification is required because Harris Chesworth represented the plaintiff partnership in connection with Richard N. Gray's departure from the firm in 2005, and because plaintiff retained Harris Chesworth in connection with the drafting of the new partnership agreement after the Gray litigation was settled.

Shortsleeve, who is not a party defendant, but is a partner in TYS, LLP, did not file an affidavit in support of the motion, although he did when the reply submissions came in. Shortsleeve's reply affidavit (denominated "Supplemental Affidavit") avers that "it was understood and represented that Mr. Leone and Harris Chesworth were representing not only . . .

[plaintiff], but also each partner individually." The affidavit is, however, conclusory in this regard, making no reference to any such "represent[ation]" by Harris Chesworth. Rechberger v. Scolaro, Shulman, Cohen, Fetter & Burstein, P.C., 45 A.D.3d 1453 (4th Dept. 2007)("defendant's representation of a corporation of which plaintiffs were shareholders does not establish that defendant had an attorney-client relationship with plaintiffs, in the absence of documentary evidence to the contrary"). Indeed, Shortsleeve avers that Harris Chesworth did not "advise me that I was not represented by them with regard to the partnership agreement," nor was there a "written or oral agreement . . . whereby I acknowledged that he and his firm represented only . . . [plaintiff] with regard to the Partnership Agreement."

Because Shortsleeve's affidavit came only in reply, plaintiff was not able as a procedural matter to address these allegations. In response to the motion to disqualify, plaintiff's counsel simply observed, correctly, that "defendants have failed to submit any evidence in admissible form alleging a conflict exists," and that he "has no conflict of interest in this matter." Plaintiff's memorandum of law relied on the entity theory of business entity representation. Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 149-50 (1st Dept. 1994), aff'd for reasons stated, 87 N.Y.2d 826 (1998), and Veritas Cap. Mgmt., LLC v. Campbell, 2 Misc.3d 1107(A)(Sup. Ct.

N.Y. Co. 2008). Thus, taken together, plaintiff's response, which invokes Talvy, may be seen as an affirmative denial of individual representation of Shortsleeve, which was enough to deny the disqualification motion in Campbell v. McKeon, 75 A.D.3d 479, 481 (1st Dept. 2010).

Discussion

Shortsleeve has not shown that Harris Chesworth's representation of plaintiff in this matter contravenes Model Rule 1.9. To warrant disqualification, the moving party has the burden of showing "[1] that there was an attorney-client relationship between the moving party and the opposing counsel, [2] that the matters involved in both representations are substantially related, and [3] that the interests of the present client and the former client are materially adverse." Jamaica Pub. Serv. Co. Ltd. v. AIU Ins. Co., 92 N.Y.2d 631, 636 (1998)(under former DR 5-108(A)(1)).

None of the moving defendants have standing to bring the motion, because no one of them ever had an attorney client relationship with Harris Chesworth. Cunningham Ex. Rel. Rogers v. Anderson, 66 A.D.3d 1207 (3d Dept. 2009); A.F.C. Enterprises, Inc. v. N.Y.C. School Constr. Auth., 33 A.D.3d 736 (2d Dept. 2006); Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d 144, 150 (1st Dept. 2006). Defendants seek to avoid this rule by asserting that Harris Chestworth's representation of the partnership in the Gray litigation and in drafting the

partnership agreement executed after Gray's departure from the firm is, in reality, representation of the partnership's individual constituents. Miller Reply Affirmation ¶34 (citing Colon v. Aldus III Associates, 296 A.D.2d 362 (1st Dept. 2002)("partnerships, unlike corporations, have no existence independent of the persons who create and control them")).

But in the context of business entity representation, that is not our law. "A lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual." Campbell v. McKeon, 75 A.D.3d at 480-81 (emphasis supplied). "Unless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees." Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 149 (1st Dept. 1994)(emphasis supplied), aff'd for reasons stated, 87 N.Y.2d 826 (1995). See Deni v. Air Niagara, 190 A.D.2d 1011 (4th Dept. 1993). It is clear that Shortsleeve's affidavit only expresses a "unilateral belief" that Harris Chesworth represented him personally. Rechberger v. Scolaro, Shulman, Cohen, Fetter & Burstein, P.C., 45 A.D.3d 1453 (4th Dept. 2007)(unilateral belief "does not by itself confer . . . the status of clients"); he does not establish other than in conclusory fashion an "expres[s] agreement otherwise" within the meaning of Talvy. Furthermore,

although Shortsleeve's affidavit, submitted only in reply, indicated that Harris Chesworth "either affirmatively led . . . [Shortsleeve] to believe that they were acting as his attorney or knowingly allowed him to proceed under that misconception," Moran v. Hurst, 32 A.D.3d 909, 911 (2d Dept. 2006), this allegation is wholly unadorned with supporting facts. See also, Nunan v. Midwest, 11 Misc.3d 1052(A)(Sup. Ct. Monroe Co. 2006)(collecting cases). It is the burden of the moving party "to present cogent evidence establishing that . . . [Harris Chesworth] had agreed to or acted as . . . [Shortsleeve's] personal attorney," Campbell v. McKeon, 75 A.D.3d at 481, but defendants failed to meet this burden.

Nor is it likely that defendants could meet this burden on these facts. Establishing an agreement otherwise, i.e., in favor of representation of a corporate actor in his or her personal capacity, is an exceedingly difficult task, especially if the conversations relied on concerned "'matters within the company or the general affairs of the company.'" U.S. Int'l Brother Teamsters, Chauffeurs, Wharehousemen and Helpers of America, AFL-CIO, 119 F.3d 210, 215-16 (2d Cir. 1997)(quoting In re Bevill, Bresler & Schulman Asset Mgmt Corp, 805 F.2d 120, 123, 125 (3d Cir. 1986))(five part test must be satisfied before court will recognize personal privilege with respect to conversations with corporate counsel). At the very least, the individual entity actor must demonstrate that he or she "ma[d]e it clear to

corporate counsel that he seeks legal advice on personal matters in order to assert a privilege over ensuing communications with corporate counsel." U.S. Int'l Brother Teamsters, Chauffeurs, Wharehousemen and Helpers of America, AFL-CIO, 119 F.3d at 215. Accordingly, one would expect successful disqualification motions to be rare under a strict interpretation of the entity rule. And this one fails to meet the required threshold. The Court of Appeals said as much in Talvy v. American Red Cross in Greater New York, 87 N.Y.2d 826 (1995), affing on op below, 205 A.D.2d 143 (1st Dept. 1994): "[C]ourts, faced with . . . disqualification motions, based on a former employee's claim that his communication with the employer's counsel, while he was employed, were confidential, thus preventing the employee's counsel from representing it in a matter adverse to the former employee, have routinely rejected such claims." Id. 205 A.D.2d at 150. "Indeed, even in circumstances where the employer's attorney represented the employee individually, albeit jointly with his former employer, in prior litigation, the court rejected the former employee's attempt to disqualify the employer's attorneys because of shared confidences or conflict of interest grounds, holding that the former client could not have reasonably assumed that the attorneys would withhold from the present client the information received." Talvy, 205 A.D.2d at 150 (citing Allegaert v. Perot, 565 F.2d 246, 250-51 (2d Cir. 1977)). The same principles apply in the partnership context. Campbell v.

McKeon, 75 A.D.3d at 480-81; Omansky v. 64 N. Moore Associates, 269 A.D.2d 336 (1st Dept. 2001).

Although defendants do not cite the case, parties moving for disqualification in similar circumstances place great reliance on the observation in Tekni-Plex v. Meyner & Landis, 89 N.Y.2d 123, 137 (1996) that "[s]ome courts have held that, in the case of a close corporation, corporate representation may be individual representation as well." But that it "may be" individual representation is determined by the circumstances defined in Talvy and the cases cited above. Tekni-Plex does not establish that dual representation exists simply by virtue of the fact that it is a close corporation or partnership that hired the lawyer. Cohen v. Acorn Intern. Ltd., 921 F.Supp. 1062, 1064 (S.D.N.Y. 1995)("On several occasions this court has held that a law firm does not represent the shareholder of a corporation, even a close corporation, simply by virtue of its representation of the corporation itself.")(quoted in Tekni-Plex). If it had so held, the court would have had no occasion to observe that "there is an insufficient record from which we can conclude that M&L jointly represented the corporation and Tang individually on matters other than the merger." Tekni-Plex v. Meyner & Landis, 89 N.Y.2d at 137-38. See Bison Plumbing Lit., Inc. v. Benderson, 281 A.D.2d 955 (4th Dept. 2001); Omansky v. 64 N. Moore Associates, supra 269 A.D.2d 336; see also, 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §26:6 (2008 ed.)("the rendition of

advice, and preparation of correspondence or legal documents for an officer or partner, in the affairs of the entity, usually is considered a legal service for the entity and not for the individual"); A.L.I., Restatement (Third) of The Law Governing Lawyers §96 comment *b* (2000)(reaffirming the "entity" theory of organizational representation as "now universally recognized in American Law").[1]

Nor is availing defendants' reliance on cases in the line of Matter of Greenberg, 206 A.D.2d 963, 965 (4th Dept. 1994), which holds that "[o]ne 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. 206 A.D.2d at 965 (emphasis supplied). Under this standard, it matters not that there was any personal representation of the corporate actor in the prior matter. But the former partnership of which Shortsleeve was a member is not a party to this action, nor did any of the prior representations of that partnership pit the partners against one another vis-a-vis partnership's affairs. In light of the presumptive entity theory of representation

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[1] Tekni-Plex has been interpreted to be a reaffirmation of the entity theory of representation, Charles W. Wolfram, Corporate-Family Conflicts, 2 J. Inst. for Study Legal Ethics 361-62 (1999), which of course is consistent with DR 5-109 (22 N.Y.C.R.R §1200.28), EC 5-18 and ABA (now N.Y.) Model Rule 1.13(a), as well as well established New York Court of Appeals precedent. Eurycleia Partners L.P. v. Seward & Kissel, LLP, 12 N.Y.3d 553, 562 (2009)("well settled that a corporation's attorney represents the corporate entity, not its shareholders or employees").

described in the cases set forth above, see also, Maxon v. Woods Oviatt Gilman LLP, 45 A.D.3d 1376 (4th Dept. 2007)(aff'ing for reasons stated below); Maxon v. Woods Oviatt Gilman LLP, 59 A.D.3d 964 (4th Dept. 2009)(aff'ing for reasons stated below), the case of Matter of Greenberg cannot be extended to these facts.

In New York, the cases are legion, that an individual business entity constituents' "unilateral beliefs and actions do not confer upon it the status of client." Lane Street Company v. Rosenberg & Estis, P.E., 192 A.D.2d 451 (1st Dept. 1993). See Berry v. Utica Nat. Ins. Group, 66 A.D.3d 1376 (4th Dept. 2009)(dismissal of attorney malpractice claim founded on a claimed prior personal representation of the individual) Griffin v. Anslow, 17 A.D.3d 889, 892-93 (3d Dept. 2005)(same); Wesdick v. Herlihy, 16 A.D.3d 223, 224 (1st Dept. 2005)("client's subjective belief as to the existence of an attorney-client relationship is not dispositive"); Hanson v. Caffry, 280 A.D.2d 704 (3d Dept. 2001)("although neither an express agreement nor payment of a fee is essential to a finding of an attorney-client relationship, a 'plaintiff's unilateral beliefs and actions do not confer upon it the status of client.'"); Volpe v. Canfield, 237 A.D.2d 282, 283 (2d Dept. 1997). That is all defendants muster here with the Shortsleeve reply affidavit.

The motion is denied, and no hearing is required. Gustafson v. Dippert, 68 A.D.3d 1678 (4th Dept. 2009).

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February __, 2011
Rochester, New York