

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

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 3-25-10
SUBMITTED: 3-25-10
MOTION NO.: 003-MOT D & ACAP

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JOSEPH BOYLAN,

Plaintiff,

-against-

ACKERMAN, LEVINE, CULLEN,
BRICKMAN & LIMMER, LLP
Attorneys for Defendant John O'Loughlin
1010 Northern Boulevard, Suite 400
Great Neck, New York 11021

JOHN O'LOUGHLIN, AND THE ESTATE OF
ROBERT CUNNINGHAM,

Defendants.

PHILLIPS, WEINER, ARTURA & COX
Attorneys for Defendant the Estate of
Robert Cunningham
165 South Wellwood Avenue
Lindenhurst, New York 11757

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Upon the following papers numbered 1 21 read on this motion to disqualify counsel ; Notice of Motion and supporting papers 1-12 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13-17 ; Replying Affidavits and supporting papers 18 ; Other 19-20; 21 ; it is,

ORDERED that the branch of the motion by the defendant John O'Loughlin which is for an order disqualifying the law firm of Phillips, Weiner, Artura & Cox from representing the Estate of Robert Cunningham is granted; and it is further

ORDERED that the branch of the motion by the defendant John O'Loughlin which is for costs and attorney's fees is referred to the trial or other disposition of this action; and it is further

ORDERED that all proceedings in this matter are stayed for 30 days from the date of service of this order so that the Estate of Robert Cunningham may have an opportunity to obtain new counsel; and it is further

ORDERED that the conference scheduled for June 23, 2010 at 2:30 p.m., in the Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive,

Riverhead, New York , is adjourned to September 16, 2010, at 11:00 a.m.; and it is further

ORDERED that, on the court's own motion, this matter is converted to an action and the caption is amended accordingly.

Preliminarily, the court notes that this action was initially commenced as a special proceeding for judicial dissolution of Audell Petroleum Corp., a New York corporation. An amended petition and a second amended petition were served on John O'Loughlin and the Estate of Robert Cunningham. The second amended petition abandons the request for judicial dissolution of Audell Petroleum Corp. and, instead, seeks a judgment declaring, *inter alia*, that Joseph Boylan is the owner of 30.55 shares or 27.5% of Audell Petroleum Corp. While a declaratory judgment is an action and not a special proceeding (*see generally*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3001:1), Joseph Boylan continues to prosecute this action in the form of a special proceeding.

Statutory authorization must exist for the use of a special proceeding to enforce a particular right. CPLR 103(b) establishes this proposition by mandating that all civil proceedings be prosecuted in the form of an action "except where prosecution in the form of a special proceeding is authorized." The bringing of a special proceeding when none is authorized is not, however, a fatal defect. CPLR 103(c) provides that the court shall not dismiss an action or proceeding solely for the reason that it was brought in the wrong form. When, as here, jurisdiction was obtained over the parties, the court may simply order a conversion to the proper form (*see*, Alexander, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, C401:1; *see also*, **Matter of Schmidt [Magnetic Head]**, 97 AD2d 244, 250). Accordingly, the court will treat this matter as an action.

Audell Petroleum Corp. was incorporated in 1976. Its purported shareholders were John O'Loughlin, Robert Cunningham (now deceased), and Joseph Boylan. In 1986, they entered into a shareholder agreement that was prepared by Robert Weiner, Esq., who purportedly supervised its execution. The agreement provides, in pertinent part, that upon the death of a shareholder, his estate or any person to whom he has bequeathed his stock shall sell his shares to the corporation. The agreement further provides that, upon the death of either Boylan or Cunningham, the survivor shall have the right of first refusal to purchase the other's shares of stock before they are offered to the corporation. Cunningham died on August 6, 2008, and bequeathed his shares to his three children. Robert Weiner, Esq., was appointed the executor of Cunningham's estate, and his law firm, Phillips, Weiner, Artura & Cox, represents the Estate of Robert Cunningham in this action. As the executor of the estate, Weiner denies the validity of the shareholder agreement and contests Boylan's status as a shareholder of Audell Petroleum Corp. O'Loughlin moves to disqualify Weiner as counsel for the Estate of Robert Cunningham.

A party seeking to disqualify an attorney or law firm must establish (1) the existence of a prior attorney-client relationship and (2) that the former and current

representations are both adverse and substantially related (**Mancheski v Gabelli Group Capital Partners**, 22 AD3d 532, 534, *citing Solow v Grace & Co.*, 83 NY2d 303, 308). Under such circumstances, the presumption of disqualification is irrebutable (**Id.**). One who has served an attorney for a corporation may not represent an individual shareholder in a case in which his interests are adverse to the other shareholders (**Morris v Morris**, 306 AD2d 449, 452; **Matter of Greenberg** [Madison Cabinet & Interiors], 206 AD2d 963, 965, *citing Matter of Fleet v Pulsar Constr. Corp.*, 143 AD2d 187).

It is undisputed that from 1986 until February 11, 2010, Weiner served as Audell's general counsel. It is also undisputed that he drafted the shareholder agreement that is the subject of this action. Moreover, the interests of the Estate of Robert Cunningham, whom Weiner now represents, are adverse to those of his former client, Audell Petroleum Corp., and the other shareholders. The court finds that, under these circumstances, disqualification is required (*see, Mancheski v Gabelli Group Capital Partners, supra; Morris v Morris, supra; Matter of Greenberg* [Madison Cabinet & Interiors], *supra; Horowitz v Horowitz*, 151 AD2d 646; **Matter of Fleet v Pulsar Constr. Corp.**, *supra*). Weiner should also be disqualified because it is likely that he will be called as a witness on the issue of whether or not the shareholder agreement was executed (*see, Rules of Professional Conduct, Rule 3.7[a]*). Accordingly, the motion is granted.

Dated: June 3, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.