STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

TERRY L. STEVENS,

Plaintiff,

v.

ALLIED BUILDERS INC.,
CHARLES W. PECORELLA,
MATTEO PECORELLA,
JOHN J. PETRONIO,
CARL V. PETRONIO, and
GARY L. NANNI,

Defendants.

DECISION AND ORDER

Index #2008/12363

In a previous motion before the court, Petitioner Terry Stevens moved for an Order pursuant to BCL 1118(c)requiring Respondents, Allied Builders, Inc., Charles W. Pecorella, Matteo Pecorella, John J. Petronio, Carl V. Petronio, and Gary L. Nanni, to post a bond or security to secure the purchase of Petitioner's shares at their fair value. Respondents cross-moved for an order: 1. denying bond, 2. enforcing a confidentiality agreement between the parties, and 3. removing petitioner's counsel due to a conflict of interest.

The return date on the motion was scheduled for October 27, 2010, however, was adjourned until November 10, 2010 to give the parties time to respond to the various cross motions. On November 1, 2010, the court issued an order adopting the confidentiality agreement as an order of the court. On November

8, petitioner submitted a reply in opposition to respondents' remaining cross motions to deny bond and remove petitioner's counsel. Petitioner's reply is supported by the affidavits of the petitioner and his counsel Richard Bell. Based on a review of these affidavits and the evidence before the court, the motion to post a bond is granted in part and the motion to remove petitioner's counsel is denied.

Motion to Post Bond

Under BCL 1118(c), a court has the discretion to "require, at any time prior to the actual purchase of petitioner's shares, the posting of a bond or other acceptable security in an amount sufficient to secure petitioner for the fair value of his shares." While the court has the discretion to order the posting of a bond or other security to secure the fair value of a minority shareholder's shares, the First Department has held that it is reversible error not to order a bond when there are "serious allegations" of financial impropriety. In re Kastleman, 234 A.D.2d 181 (1st Dept. 1996); In re 212 East 52nd Street Corp., 185 Misc.2d 95, 100 (Sup. Ct. N.Y. Co. 2000). While the Kastleman court did not define what allegations rise to the level of 'serious' it ruled that it was reversible error not to order posting of a bond where the parties had drastically differing opinions as to the value of the minority shareholder's shares, that there were several lawsuits pending against controlling

shareholders and there was a likelihood that if the allegations of waste and mismanagement were substantiated, the corporation would be worthless. Id.

Here, the petitioner alleges that Allied's financial statements show substantial accounting abnormalities which include a significant cash reduction within a period of two months and also that "Allied's financial condition appears to have taken a significant turn for the worse . . ." Bell Affidavit at ¶11. First, these unsubstantiated allegations are not serious enough to justify an order posting bond. Moreover, respondents have come forth with sufficient proof to refute any allegations of impropriety. Based on the affidavit of Richard George and the evidence submitted in support of the motion, any allegations that Allied engaged in financial impropriety cannot be upheld. While Allied's statements show reductions in cash during a two month period, petitioner ignores the fact that there were also concurrent reductions in liabilities. George Affidavit at ¶8-10. Furthermore, the court must take into account the recession of Summer 2008 when considering any losses in earnings during this time period. Petitioner's claims of financial impropriety are refuted by the evidence put forth.

In response to petitioner's allegations of Allied's current financial condition, Respondents submitted evidence of a project backlog amounting to $15-$20 million. Richard George Affidavit

at ¶23 [**unredacted version**]. However, in its response, petitioner alleges that Richard George's Exhibit A (see petitioner's response in opposition **unredacted version**) included several projects that were nearly completed two years ago and may have been included to inflate the backlog and also do not include any cost information regarding project backlogs which may not support the profit estimations. Bell Affidavit at ¶6; Stevens Affidavit at ¶9.

Because of the conflicting information regarding the project backlog, and the need for further information from Allied regarding its current financial condition, it would be an abuse of discretion not to order some bond. However, the court will not order the full requested bond of $1.8 million. Petitioner's valuation calculations of $8 million must be rejected because Mr. Thaney's calculations are based on reports from 2005. The 2005 report was "prepared as of a specific date, for an intended user and an intended use[,] . . . " a clear violation of the professional standards set out by the AICPA Code of Professional Conduct. Camarella Affidavit at ¶ ¶4, 10. The court also rejects petitioner's accountant's "estimated value" as a measure of valuation for Allied. Mr. Thaney admitted that certain schedules were missing from his evaluation and that these schedules were not only critical to the valuation of Allied but also required under *Statements on Standard Standards for*

Valuation Service No. 1. Petitioner's Exhibit A. It would be improper to rely on this preliminary opinion for valuation as Mr. Thaney does not stand behind it as a final opinion, and it was created in violation of the standards set forth by the AICPA Code of Professional Conduct. Accordingly, the application for a bond of $1.8 million is denied, and the respondents are directed to post a $1,000,000 security bond.

Motion to Remove Counsel

Allied contends that petitioner's counsel, the law firm of Gates & Adams, P.C., and attorney Richard T. Bell, Jr. must be removed from this litigation because of an irreconcilable conflict of interest. Respondents contend that Mr. Bell simultaneously represents CNP Mechanical, Inc., a party to a different matter involving Allied and that CNP and petitioners have adverse interests constituting a violation of the Rules of Professional Conduct 22 NYCRR 1200-Rules 1.1(c), 1.4, 1.7(a) and 1.8(b).

Gates and Adams argues that Allied's attorney, Jim Gresens, was aware of the simultaneous representation of CNP and petitioner and that after a review of Muriel Siebert & Co., Inc. v. Intuit, Inc., 8 N.Y.3d 506 (2007), he withdrew his claim of conflict.[1] Moreover, petitioner's counsel alleges that Allied

[1] See, e.g., Lake v. Kaleida Health, 60 A.D.3d 1469, 876 N.Y.S.2d 800 (4th Dept. 2009) (reversing lower court, stating that "the motion should have been denied on the ground that

lacks standing to seek Gates and Adams' disqualification under Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 A.D.3d 144, lv. to app. den. 8 N.Y.3d 802 (2007).

It is well settled that "disqualification of an attorney is a matter which rests within the sound discretion of the court." Fischer v. Deitsch 168 A.D.2d 599, 563 (2d Dept. 1990). Courts must balance the "interest in avoiding even the appearance of impropriety [with] a party's right to representation by counsel of choice and danger that such motions can become tactical 'derailment' weapons for strategic advantage in litigation." Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 638 (1998)(internal citations omitted).

The threshold question in this case, however, is whether Allied even has standing to bring a motion for disqualification of opposing counsel. The court finds that Allied lacks standing and the motion to disqualify is denied for the reasons that

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plaintiffs were aware or should have been aware of the facts underlying the alleged conflict of interest for more than two years before bringing the motion"); Eisenstadt v. Eisenstadt, 282 A.D.2d 570, 723 N.Y.S.2d 395 (2d Dept. 2001) (disqualification order reversed, over two-year delay in defendant's moving to disqualify); Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 618 N.Y.S.2d 25 (1st Dept. 1994), order aff'd, 87 N.Y.2d 826, 637 N.Y.S.2d 687, 661 N.E.2d 159 (1995) ("Plaintiff's laches in seeking such relief furnishes an additional consideration especially where, as here, there is an inadequate showing to warrant disqualification."); Lewis v. Unigard Mut. Ins. Co., 83 A.D.2d 919, 442 N.Y.S.2d 522 (1st Dept. 1981)("the inordinate and inadequately explained delay in moving for disqualification" was factor in denying motion).

follow.

Standing

Petitioner contends that Allied lacks standing to seek Gates and Adams' removal, citing Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., supra. In Develop Don't Destroy Brooklyn, the court held that the petitioners seeking removal "had no standing to seek disqualification since they did not claim, nor had there ever been an attorney-client relationship between the attorney/law firm and petitioners. Id. 31 A.D.3d at 150. The Appellate Division, First Department, found that the lower court mistakenly based its analysis on the N.Y. Code of Professional Responsibility rule dealing with simultaneous representation instead of the rule dealing with representation of former clients. It is well settled that, in New York, a party seeking removal of an adversary's lawyer pursuant to the rules regarding former clients "must prove that there was an attorney-client relationship between the moving party and the opposing counsel." Jamaica Pub. Serv. Co., 92 N.Y.2d at 636 (1998); Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 308 (1994).

This rationale, however, can be extended to a motion brought under the rule dealing with simultaneous representation, the rule at issue in the instant motion. (22 NYCRR 1200 Rule 1.7(a)). "The basis of a disqualification motion is an allegation of a breach of a fiduciary duty owed by an attorney to a current or

former client (citation omitted)." Rowley v. Waterfront Airways, Inc., 113 A.D.2d 926, 927 (2d Dept. 1985). Therefore, standing to successfully assert such a motion requires the moving party to show a fiduciary relationship between the attorney/law firm and the party seeking disqualification. "[I]f there is no duty owed there can be no duty breached." Id.

In this case, Allied lacks standing to raise the issue of a conflict of interest. Allied has not shown that an attorney-client relationship existed between itself and opposing counsel. Representation of an individual corporate constituent is not representation of the corporation, particularly in a proceeding for dissolution. Respondents allege that petitioner owes a duty to Allied based on the confidentiality agreement. While Gates and Adams owed a legal duty to Allied under the contract, there was no fiduciary duty that can be compared to the relationship of an attorney and his client. Accordingly, there is no breach of fiduciary duty with regards to Allied, and the motion to disqualify on this basis must be denied.

As previously stated, a motion to disqualify is addressed to the sound discretion of the court, and "any doubts are to be resolved in favor of disqualification." Matter of Stober v. Gaba & Stober, P.C., 259 A.D.2d 554, 555 [2d Dept 1999]. Although Allied lacks standing to bring a motion for disqualification, and the parties purported to be affected have not brought such a

motion, there are cases where the court may raise the issue of disqualification *sua sponte* and should do so under certain circumstances. See People v. Swanson, 43 A.D.3d 1331, 1332 [4th Dept. 2007] [violation of witness-advocate rule]; see also Boyd v. Trent, 287 A.D.2d 475, 475-76 [2d Dept. 2002] [conflict of interest]. Respondents urge the court to rule on the motion *sua sponte*.

I do not believe the instant case rises to the level of a situation where the court should address the matter *sua sponte.* The court has been aware of this simultaneous representation and neither "affected" party has objected. While the court was previously troubled by the fact that Mr. Stevens may not have been informed of the simultaneous representation, Mr. Stevens' affidavit rebuts the alleged violation of Rule 1.7 which requires the client's informed consent in cases of simultaneous representation. "The simultaneous representation of [opposing parties] even though on unrelated matters is at best unseemly." Rubenstein v. Foster Bros. Mfg. Co., 52 A.D.2d 597, 597 (2d Dept. 1976). However, the basis for many courts dismissing potentially unseemly conflicts of interest have rested with the clients signing waivers after being informed of all potential conflicts that may arise. Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d 144 (2006); *see also* Camel vs. Nijjar, 22 Misc.3d 1122A, 2009 Misc. LEXIS 269. Mr. Stevens was aware that

Gates and Adams represented CNP even prior to the commencement of the instant litigation, and he avers that he is fully aware of the effect that any judgment in favor of CNP will have on his claims against Allied. Stevens' Affidavit at ¶¶3-4. In any event, Gates and Adams never represented Allied, but only represented Stevens. Prior or simultaneous representation adverse to the interests of Allied might affect Stevens if he chose to object, but he has not. Indeed as Stevens "appears . . . [to be] the only party [within the context of this dissolution proceeding] who could have been conceivably harmed by the potential conflict," Kovacevich v. Kent State University, 224 F.3d 806, 833 (6th Cir. 2000), there is no warrant for a *sua sponte* review. See also, Melamed v. ITT Continental Banking Co., 592 F.2d 290, 293 (6th Cir. 1979).

The mere appearance of impropriety is insufficient to disqualify counsel and must be balanced with the party's right to counsel of his choice as well as the possibility that the motion for disqualification may be motivated purely by tactical considerations. Develop Don't Destroy Brooklyn, 31 A.D.3d at 153. The court fails to perceive an appearance of impropriety where Stevens failed to object and has knowing consented after full disclosure. Both Mr. Stevens and CNP agreed to the simultaneous representation. Accordingly, the motion to remove counsel is denied.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: November 16, 2010
Rochester, New York